I 1.12/3:3/18

SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY
Room

Volume 3, No. 18, Pages 5208 to 5435,
August 29 - September 9, 1988.

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the **FCC Record**. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the **FCC Record** should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the **FCC Reports**.

Citation Form: 2 FCC Rcd 1 (1987)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

OCT 25 1988

Depository Document

Federal Communications Commission Record

Volume 3
Issue 18

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....5208

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 18

Case Name	Page
Adams, Linda	5212
Aetna Life Insurance Company and Aetna Casualty and Safety Co.	5282
Airborne Use of Cellular Units and Cell Enhancers	5265
Amendment of Part 2 - Allocation of the 216-225 MHz band	5287
Amendment of Part 76, Subpart J, Section 76.501	5283
Amendment of the Maritime Services Rules	5406
American Mobilphone, Inc.	5351
American Telephone and Telegraph Company	5388
American Teltronix	5347
Annual 1988 Access Tariff Filings	5275
Audio Enterprises, Inc.	5402
Bell, Randolph Victor	5365
Channel 50 Television	5228
Clarification of FM Channel Allotment at La Plata, MD	5261
Communications Between Police and Amateur Radio Stations	5350
Digital Radio Network, Inc.	5383
Evangel Communications, Inc.	5421
FTC Communications, Inc.	5420
Faye & Richard Tuck, Inc. KBEC	5374
GRR Marketing	5370
GTE Telephone Operating Companies	5280
Intellicall Operator Services, Inc.	5269
Inventory of Systems of Records	5352
J&C Broadcasting Company	5272
Jacksonville Cellular Telephone Corporation	5386
Josey Communications, Inc.	5209
Kelley, Oliver and Mary Ann	5361
MTS and WATS Market Structure	5413
Mableton Broadcasting Company, Inc.	5357
New York Telephone Company	5389
North American Telecommunications Association	5278
Overseas Telecommunications, Inc.	5419
Pate, James Boyd	5372
Peoria Broadcasting Company	5208
Program Exclusivity - Cable and Broadcast Industries	5299
Public Safety National Plan	5391
RKO General, Inc. (WGMS)	5262
Rates for Dominant Carriers	5297
Reorganization and Deregulation of Part 97	5277
Screamer Mountain Radio	5364
Table of Allotments, FM, Amarillo, TX	5245
Table of Allotments, FM, Cedar Key, FL	5241

Case Name	Page
Table of Allotments, FM, Chickasaw, AL and Quitman, MS	5217
Table of Allotments, FM, Cocoa, FL	5213
Table of Allotments, FM, El Dorado and Kingman, KS	5239
Table of Allotments, FM, Essex, CA	5403
Table of Allotments, FM, Estherville, IA	5219
Table of Allotments, FM, Grenada, MS	5238
Table of Allotments, FM, Hawley, PA	5247
Table of Allotments, FM, Helen, GA	5251
Table of Allotments, FM, Hutchinson, KS	5224
Table of Allotments, FM, Idalia, CO	5257
Table of Allotments, FM, Iuka, MS (Erratum)	5355
Table of Allotments, FM, Kalispell, MT	5253
Table of Allotments, FM, Kalkaska and Cadillac, MI	5225
Table of Allotments, FM, Larned, KS	5227
Table of Allotments, FM, Malone and Owls Head, NY	5243
Table of Allotments, FM, Oildale, CA	5223
Table of Allotments, FM, Ontonagon, MI (Erratum)	5356
Table of Allotments, FM, Panama City Beach, FL	5214
Table of Allotments, FM, Pearson, GA	5255
Table of Allotments, FM, Ramsey and Shelbyville, IL	5259
Table of Allotments, FM, Reidsville, NC and Marion, VA	5215
Table of Allotments, FM, Ringgold, GA	5249
Table of Allotments, FM, Rogers City, MI	5353
Table of Allotments, FM, Searles Valley, CA	5221
Table of Allotments, FM, Spring Hill, FL	5220
Table of Allotments, TV, Coos Bay, OR	5242
Tenneco Communications Corporation	5405
Tree Top Broadcasting Associates	5230
Trunking Standards for Equipment Operating in 800 MHz bands	5399
United States Cellular Operating Company of Panama City, Florida	5345
Viking Amusements Corporation	5435
Wahlberg, Randall R.	5270
Westwind Radio Company	5235

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 18

Delegated Authority or FCC Number	Page
DA 88 -1125	5228
DA 88 -1126	5208
DA 88 -1148	5230
DA 88 -1163	5238
DA 88 -1180	5209
DA 88 -1181	5235
DA 88 -1182	5270
DA 88 -1183	5212
DA 88 -1215	5272
DA 88 -1220	5357
DA 88 -1221	5361
DA 88 -1238	5364
DA 88 -1239	5365
DA 88 -1243	5350
DA 88 -1251	5370
DA 88 -1256	5372
DA 88 -1258	5213
DA 88 -1259	5214
DA 88 -1260	5215
DA 88 -1261	5403
DA 88 -1262	5353
DA 88 -1263	5435
DA 88 -1279	5355
DA 88 -1281	5356
DA 88 -1282	5402
DA 88 -1283	5345
DA 88 -1284	5278
DA 88 -1301	5275
DA 88 -1311	5261
DA 88 -1312	5217
DA 88 -1313	5219
DA 88 -1314	5220
DA 88 -1315	5221
DA 88 -1316	5223
DA 88 -1317	5224
DA 88 -1318	5225
DA 88 -1319	5227
DA 88 -1321	5277
DA 88 -1323	5239
DA 88 -1324	5241
DA 88 -1325	5242
DA 88 -1326	5243
DA 88 -1327	5245
DA 88 -1328	5247
DA 88 -1330	5269
DA 88 -1331	5280
DA 88 -1332	5249
DA 88 -1333	5251
DA 88 -1334	5253
DA 88 -1335	5255
DA 88 -1336	5257
DA 88 -1337	5259
DA 88 -1341	5282
DA 88 -1345	5388
DA 88 -1346	5389
DA 88 -1347	5351
DA 88 -1356	5352
DA 88 -1357	5413
DA 88 -1358	5405
DA 88 -1360	5420
DA 88 -1361	5419
FCC 88 - 180	5299
FCC 88 - 247	5391
FCC 88 - 266	5287
FCC 88 - 268	5383
FCC 88 - 271	5283
FCC 88 - 278	5265
FCC 88 - 279	5262
FCC 88 - 281	5297
FCC 88 - 282	5347
FCC 88 - 284	5386
FCC 88 - 285	5406
FCC 88 - 286	5374
FCC 88 - 287	5399
FCC 88D - 27	5421

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 3
Issue 18

Docket Number				Page
BC	Dkt.No.80	-	90	5261
BC	Dkt.No.82	-	434	5283
CC	Dkt.No.78	-	72	5413
CC	Dkt.No.87	-	313	5297
CC	Dkt.No.88	-	1	5275
CC	Dkt.No.88	-	411	5265
GEN	Dkt.No.87	-	14	5287
GEN	Dkt.No.87	-	24	5299
GEN	Dkt.No.87	-	112	5391
GEN	Dkt.No.88	-	441	5399
MM	Dkt.No.83	-	212	5374
MM	Dkt.No.84	-	1148	5262
MM	Dkt.No.86	-	273	5214
MM	Dkt.No.86	-	386	5225
MM	Dkt.No.86	-	440	5421
MM	Dkt.No.87	-	284	5215
MM	Dkt.No.87	-	332	5223
MM	Dkt.No.87	-	405	5220
MM	Dkt.No.87	-	432	5217
MM	Dkt.No.87	-	472	5241
MM	Dkt.No.87	-	527	5213
MM	Dkt.No.87	-	538	5221
MM	Dkt.No.87	-	586	5224
MM	Dkt.No.87	-	596	5239
MM	Dkt.No.87	-	609	5238
MM	Dkt.No.88	-	42	5242
MM	Dkt.No.88	-	45	5219
MM	Dkt.No.88	-	50	5356
MM	Dkt.No.88	-	66	5243
MM	Dkt.No.88	-	79	5355
MM	Dkt.No.88	-	144	5227
MM	Dkt.No.88	-	371	5228
MM	Dkt.No.88	-	381	5208
MM	Dkt.No.88	-	391	5212
MM	Dkt.No.88	-	392	5209
MM	Dkt.No.88	-	393	5230
MM	Dkt.No.88	-	394	5235
MM	Dkt.No.88	-	395	5270
MM	Dkt.No.88	-	397	5403
MM	Dkt.No.88	-	398	5353
MM	Dkt.No.88	-	399	5272
MM	Dkt.No.88	-	400	5357
MM	Dkt.No.88	-	401	5361
MM	Dkt.No.88	-	402	5364
MM	Dkt.No.88	-	403	5365
MM	Dkt.No.88	-	404	5370
MM	Dkt.No.88	-	405	5372
MM	Dkt.No.88	-	412	5259
MM	Dkt.No.88	-	413	5249
MM	Dkt.No.88	-	414	5251
MM	Dkt.No.88	-	415	5253
MM	Dkt.No.88	-	416	5255
MM	Dkt.No.88	-	417	5257
MM	Dkt.No.88	-	418	5247
MM	Dkt.No.88	-	419	5245
PR	Dkt.No.86	-	424	5406
PR	Dkt.No.88	-	139	5277

Table of Cases by Rulemaking Number
Volume 3
Issue 18

Rulemaking Number	Page
RM - 4829	5287
RM - 4831	5287
RM - 4983	5287
RM - 5166	5406
RM - 5254	5214
RM - 5449	5225
RM - 5645	5225
RM - 5751	5223
RM - 5794	5215
RM - 5872	5221
RM - 5886	5220
RM - 5936	5241
RM - 5953	5213
RM - 5975	5239
RM - 6002	5217
RM - 6005	5224
RM - 6008	5219
RM - 6028	5238
RM - 6105	5356
RM - 6139	5242
RM - 6167	5227
RM - 6231	5251
RM - 6295	5257
RM - 6326	5403
RM - 6358	5245
RM - 6369	5259
RM - 6370	5249
RM - 6389	5353
RM - 6401	5253
RM - 6402	5247
RM - 6426	5255

Table of Cases by City
Volume 3
Issue 18

City/State	Page	City/State	Page
Amarillo, TX	5245	Mableton, GA	5357
Arlington, NY	5230	Malone, NY	5243
Bethesda, MD	5262	Marion, VA	5215
Cadillac, MI	5225	Mt. Vernon, MO	5212
Cedar Key, FL	5241	New Ellenton, SC	5370
Charlottesville, VA	5421	Nolanville, TX	5361
Chickasaw, AL	5217	Oildale, CA	5223
Clayton, GA	5364	Ontonagon, MI	5356
Cocoa, FL	5213	Owls Head, NY	5243
Coos Bay, OR	5242	Panama City, FL	5345
El Dorado, KS	5239	Panama City Beach, FL	5214
Essex, CA	5403	Pearson, GA	5255
Estherville, IA	5219	Peoria, IL	5208
Evansville, IN	5365	Quitman, MS	5217
Georgetown, TX	5209	Ramsey, IL	5259
Grenada, MS	5238	Reidsville, NC	5215
Hawley, PA	5247	Ringgold, GA	5249
Helen, GA	5251	Rogers City, MI	5353
Hutchinson, KS	5224	Searles Valley, CA	5221
Idalia, CO	5257	Shelbyville, IL	5259
Iuka, MS	5355	Spring Hill, FL	5220
Kalispell, MT	5253	Springfield, FL	5270
Kalkaska, MI	5225	Twentynine Palms, CA	5235
Kingman, KS	5239	Vienna, VA	5383
La Plata, MD	5261	Waxahachie, TX	5374
Larned, KS	5227	Windsor, VA	5272
		Winfield, AL	5372

Subject Index
Volume 3
Issue 18

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Character qualifications	5262
Orders or Notices	
Misrepresentation and lack of candor	5421
Multiple ownership	5228
New service v. expansion of existing service	5208, 5228
Partnership	5421
Programming, specialized	5208, 5228
Reopening of record	5208, 5228
Broadcast Radio Services - General Rules	
Applications for authorization	
Conflicts in applications, agreement for removing	5262
Changes, renewals in existing stations	
Assignment or transfer of control, procedures for	5262
Licenses and permits	
Multiple ownership of broadcast stations in the same service	5262
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	5238, 5220, 5224, 5225, 5214, 5215, 5219, 5249, 5255, 5257, 5241, 5242, 5247, 5403, 5356
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	5269
Communications Act of 1934	
Common Carriers	
Extension of lines, certificate for	5269
Practice and Procedure	
Pleadings, briefs	
Extension of time, motions for	5402

Subject	Page
Public Mobile Service	
Transfers and assignments of applications	5265
Domestic public cellular radio telecommunications service	
Emission requirements	5265
Permissible communications	5265
Power, limitations on	5265
General information	

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
(GRR Marketing) (New Ellenton, South Carolina)	5370
(James Boyd Pate) (Winfield, Alabama)	5372
(Jon A. & Connie C. Hill) (Windsor, Virginia)	5272
(Josey Communications, Inc.) (Georgetown, Texas)	5209
(Linda Adams)(Mt. Vernon, Missouri)	5212
(Mableton Broadcasting Company, Inc.) (Mableton, Georgia)	5357
(Mr. Vincent Bosquez d/b/a/ Westwind Radio)(Twentynine Palms	5235
(Oliver Kelley and Mary Ann Kelley) (Nolanville, Texas)	5361
(Randall R. Wahlberg)(Springfield, Florida)	5270
(Randolph Victor Bell) (Evansville, Indiana)	5365
(Tree Top Broadcasting Associates) (Arlington, New York)	5230
(W. L. Savage) (Clayton, Georgia)	5364
0.552--553 Privacy Act Regulations	5352
000.331 Authority delegated	5277
001.046 Motions For Extension of Time	5278
001.046 Motions for Extension of Time	5297
001.046 Motions for Extension of Time	5402
001.106 Petitions for reconsideration	5275
001.115 Application for review of action taken pursuant to	5374
001.711 Formal or informal complaints	5282
001.773 Petitions for suspension or rejection of new tariff	5280
002.106 Table of Frequency Allocations	5287
002.106 Table of frequency allocations	5406
022.002 Definitions	5265
022.904 Power Limitations	5265
022.907 Emission Requirements	5265
022.911 Permissible Communications	5265
022.913 Content and form of applications	5386
022.921 Ownership in appl. for cellular service for markets	5386
022.922 Cell Enhancers	5265
025.209 Antenna Performance Standards	5405
047.000 C.F.R. 1.773	5389
047.000 C.F.R. § 1.773	5388
061.054 Composition of tariffs	5280
063.001 Contents of Applications	5269
069.004 Changes to be filed	5280
073.202 FM Table of Allotments	5217
073.202 FM Table of Allotments	5220
073.202 FM Table of Allotments	5221
073.202 FM Table of Allotments	5223
073.202 FM Table of Allotments	5224
073.202 FM Table of Allotments	5227
073.202 FM Table of Allotments	5239
073.202 FM Table of Allotments	5245
073.202 FM Table of Allotments	5253
073.202 FM Table of Allotments	5257
073.202 FM Table of Allotments	5259
073.202 FM Table of Allotments	5353
073.202 FM Table of Allotments	5355
073.202 FM Table of Allotments	5356

073.202 FM Table of Allotments 5403
073.202 TV Table of Allotments 5238
073.202, FM Table of Allotments 5213
073.202, FM Table of Allotments 5215
073.202, FM Table of Allotments 5219
073.202, FM Table of Allotments 5241
073.202, FM Table of Allotments 5243
073.202, FM Table of Allotments 5247
073.202, FM Table of Allotments 5249
073.202, FM Table of Allotments 5251
073.202, FM Table of Allotments 5255
073.3525 Agreements for removing application conflicts 5262
073.3555 Multiple ownership 5262
073.3597 Procedures on transfer and assignment applications 5262
073.606, TV Table of Allotments 5214
073.606, TV Table of Allotments 5242
076.501 Cross-ownership 5283
080.015 Eligibility for station license 5406
080.1061 Special requirements for 406.025 MHz EPIRBs 5406
090.179 Shared use of radio stations 5351
090.615 Frequencies available for conventional systems 5435
094.051(a) Time in which station must be in operation 5383
097.089 Points of communications 5350
097.110 Business communications prohibited 5350
300.201 Service and Charges 5420
300.204 Lawfulness of charges 5275
300.214 Extension of Lines 5269
300.309 Action Upon Applications, Form of and Conditions Att 5419
331.000 (c) Private land mobile services 5347
500.035 - Integration, Quantitative 5421
500.110 Minimum Separation 5228
500.112 Air Hazard 5208
500.112 Air Hazard 5228
500.125 - Misrepresentation 5421
500.140 Comparative 5228
500.140 Comparativr 5208
500.150 Ultimate 5208
500.150 Ultimate 5228
500.165 - Environmental Impact 5421
500.3085 307b, distribution of broadcast facilities 5374
500.3095 character qualifications 5262
500.3200 reopening of record 5374
73.202 FM Table of Allotments 5225
Airborne Use of Cellular Units & Use of Cell Enhancers in DP 5265
Part 36 Jurisdictional Separations Procedures 5413

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-381

In re Applications of

PEORIA BROADCASTING COMPANY — File No. BPCT-870331LZ

PEORIA BROADCASTING SERVICES, INC. — File No. BPCT-880209KJ

For Construction Permit for a New TV Station
Peoria, Illinois

HEARING DESIGNATION ORDER

Adopted: July 7, 1988; Released: August 29, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for authority to construct a new television station to operate on Channel 59, Peoria, Illinois.

2. Peoria Broadcasting Services, Inc. submitted a qualified certification that it is financially qualified to construct and operate as proposed. The applicant indicates that it will amend as soon as all of the supporting documents are available. In view of this, the applicant will be given 30 days from the release date of this Order to review its financial proposal in light of Commission requirements, to make any changes that may be necessary, and, if appropriate, to submit an unqualified certification to the presiding Administrative Law Judge in the manner called for in Section III, FCC Form 301, as to its financial qualifications. If the applicant cannot make the required certification, it shall so advise the presiding Administrative Law Judge who shall then specify an appropriate issue.

3. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. The technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That Peoria Broadcasting Services, Inc. shall submit a financial certification in the form required by Section III, FCC Form 301 or advise the Administrative Law Judge that certification cannot be made, as may be appropriate, within 30 days after this Order is released.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to his notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Service Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-392

In re Applications of

JOSEY COMMUNICATIONS, INC. (hereafter Josey)	File No. BPH-870629NM
ELINOR LEWIS STEPHENS (hereafter Stephens)	File No. BPH-870630MN
GEORGETOWN COMMUNITY RADIO, LTD. (hereafter Community)	File No. BPH-870701MS
WILLIS JAY HARPOLE d/b/a GEORGETOWN BROADCASTERS (hereafter Georgetown)	File No. BPH-870701MT
EAST TEXAS LIMITED PARTNERSHIP (hereafter East Texas)	File No. BPH-870701MW
WILLIAMSON COUNTY COMMUNICATIONS, INC. (hereafter Williamson)	File No. BPH-870701NA
WILLIAM C. GROVE (hereafter Grove)	File No. BPH-870701NC

For Construction Permit for a
New FM Station, Channel 299A, 107.7 MHZ
Georgetown, Texas

HEARING DESIGNATION ORDER

Adopted: July 22, 1988; Released: August 29, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Josey, Stephens, Community, Georgetown, East Texas and Williamson have indicated that their proposals will fail to provide the requisite 70 dBu signal over the entire community of license in accordance with 47 C.F.R. § 73.315(a). In all cases, the area not covered is less than 3% of the community of license; however, 100% of the population will receive a 70 dBu signal. All the above applicants, except for Williamson, have requested a waiver of 47 C.F.R. § 73.315(a). However, the staff has determined these applications to be in substantial compliance with the rule. *See John R. Hughes*, 50 Fed. Reg. 5679 (1985). Accordingly, their waiver requests will be dismissed as moot.

3. *Josey.* The applicant has indicated that Donna S. Josey, a principal of the applicant, owns a 30% interest in Sun Systems, Inc., a weekly newspaper serving Williamson County which includes the community of Georgetown, Texas. Mrs. Josey has stated her intention to divest her interest in this newspaper in the event a construction permit is awarded to her as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

4. On July 1, 1988, Williamson filed an informal objection to the application of Josey. Williamson alleges that Josey's application, as originally filed, specified a site 0.49 kilometers short-spaced to station KBUC-FM, San Antonio, Texas. Furthermore, Williamson argues that Josey failed to correct this situation with an amendment filed within 30 days of the date its application was placed on a "Notice of Tender" pursuant to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). Williamson contends, therefore, that Josey's application should be returned as unacceptable for filing pursuant to 47 C.F.R. § 73.207(b)(1).

5. 47 C.F.R. § 73.209 states that, in computing distance, applicants shall include "sufficient decimal figures . . . . to determine the distance to the nearest kilometer." Josey has stated that it is 168.5 kilometers from KBUC- FM. Engineering review of Josey's application confirms that it is 168.543 kilometers from this station. Thus, utilizing the principals set forth in 47 C.F.R. § 73.209, the distance from Josey's transmitter site to KBUC-FM "rounds up" to the requisite 169 kilometers. *See Ronette Communications Corp.*, 51 RR2d 229 (B/C Bur. 1982). Accordingly, Williamson's informal objection will be denied.

6. *Stephens.* The applicant has indicated that she is employed as a book-keeper for KIOC(FM), Orange, Texas and for Stephens Radio, Inc., the licensee of KTUX(FM), Carthage, Texas, where she is also General Manager. Mrs. Stephens has stated her intention to terminate her employment at these two stations in the event a construction permit is awarded to her as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

7. *Community.* The applicant has indicated that Richard Clester, a general partner of the applicant, is an employee of Presidio Communications, Inc. and that he also owns 5% interest in the cable system this company proposes to build in Travis County, Texas. He also owns a 5% interest in Blockhouse Creek Cable Television Limited Partnership. Mr. Clester has stated his intention to divest these interests and to terminate his employment with Presidio Communications, Inc. if Community is awarded a construction permit as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

8. *Georgetown.* The applicant has indicated that he is the president, director and 99.8% owner of Uvalde Broadcasters, Inc., the licensee of KVOU(AM) and KYUF(FM),

Uvalde, Texas. He is also the president and 50% owner of SMR Corporation, licensee of KSPL(AM), San Marcos, Texas. Finally, he is president, director and 50% owner of Border Broadcasters, Inc., the licensee of KOYE(FM), Laredo, Texas and the holder of a construction permit for a new AM station in Del Mar Hills, Texas. The applicant has stated his intention to divest all interests in these companies if awarded a construction permit as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

9. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Georgetown has not completed Item 4 correctly. Georgetown's application gives a post office box number as the residence address for Willis Jay Harpole. Accordingly, Georgetown must submit an amendment which gives all of the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *East Texas*. The applicant has indicated that Michelle Y. Madison, a limited partner of East Texas, is employed by EGG Dallas Broadcasting Inc., licensee of KDLZ(FM), Fort Worth, Texas. Ms. Madison has stated her intention to resign her position if a construction permit is awarded to East Texas as result of this proceeding. Accordingly, an appropriate condition will be ordered.

11. *Williamson*. On September 21, 1987, Williamson timely filed an amendment to specify a change in the nature of the applicant from an individual to a corporation. Josey has filed a petition[1] to deny Williamson's application to which Williamson has filed an opposition. As originally filed, Williamson's application stated that it was an "individual" consisting of Clarence and Cynthia Wuthrich. Josey alleges that this inconsistency was fatal to Williamson's application since it is not possible for two people to be an individual and Williamson's failure to detail the exact nature of its ownership when originally filed rendered it substantially incomplete pursuant to 47 C.F.R. § 73.3564(a). Josey argues that the Commission should reject Williamson's application pursuant to the "hard look" processing system adopted in the *Report and Order* in MM Docket 84-750, *supra*.

12. Josey's "petition" is essentially a petition to specify issues. Since the Commission's *Report and Order in re Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part 1 of the Commission's Rules* 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in Josey's petition have not been considered. Accordingly, an opportunity to raise any allegations therein will be afforded Josey post-designation pursuant to 47 C.F.R. § 1.229.

13. *Other Matters*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and from East Texas and Williamson have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by East Texas and Williamson would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

14. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Williamson	April 27, 1988 (engineering)

15. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: East Texas, Williamson.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That in light of the discussion in paragraph 2, above, the requests for waiver of 47 C.F.R. § 73.315(a) by Josey, Stephens, Community, Georgetown, and East Texas ARE DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED, That if a construction permit is awarded to Josey as a result of this proceeding, Donna S. Josey will divest herself of all interest in Sun Systems, Inc. prior to the commencement of program test authority.

20. IT IS FURTHER ORDERED, That Williamson's July 1, 1988 informal objection to Josey's application IS DENIED.

21. IT IS FURTHER ORDERED, That if a construction permit is awarded to Stephens as a result of this proceeding, the applicant will terminate her employment with KIOC(FM) and KTUX(FM) prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That if a construction permit is awarded to Community as a result of this proceeding, Richard Clester will divest himself of all interest in Presidio Communications, Inc. and Blockhouse Creek Cable Television Limited Partnership prior to the commencement of program test authority.

23. IT IS FURTHER ORDERED, That if a construction permit is awarded to Georgetown, the applicant will divest himself of all interest in and sever all connection with Uvalde Broadcasters, Inc., SMR Corporation, and Border Broadcasters, Inc. prior to the commencement of program test authority.

24. IT IS FURTHER ORDERED, That in light of the discussion in paragraph 9, above, Georgetown shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to East Texas as a result of this proceeding, Michelle Y. Madison will terminate her employment at KDLZ(FM) prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 11 and 12, above, Josey's petition to deny the application of Williamson IS DISMISSED.

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Williamson (4/27/88).

29. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) requires that petitions to deny an application be filed within 30 days of the application appearing on a "Notice of Acceptance" released by the Commission. Williamson's application appeared on a notice of acceptance released December 21, 1987. Josey's petition to deny was filed on April 29, 1988. It is thus untimely filed and will be considered as an informal objection pursuant to 47 C.F.R. § 73.3587.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-391

In re Applications of

LINDA ADAMS (hereafter Adams) — File No. BPH-861126ME

TIM CANTRELL (herafter Cantrell) — File No. BPH-861126MZ

For Construction Permit for a New FM Station, Channel 294A, Mt. Vernon, Missouri

HEARING DESIGNATION ORDER

Adopted: July 26, 1988; Released: August 29, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Applicant Cantrell petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after January 29, 1988, the last date for filing minor amendments as of right. However, the Commission had ordered Cantrell to file the amendment. *See Report and Order* in MM Docket 86-219, RM-5252, 2 FCC Rcd 7415, 7416 (1987). Therefore, under Section 73.3514 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Cantrell	June 7, 1988

3. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. APPLICANT: Cantrell

4. Except as may be indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Cantrell.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

6. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Cantrell.

7. IT IS FURTHER ORDERED, That the Federal Aviation Adminstration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Branch, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-527

In the Matter of

Amendment of Section 73.202(b), RM-5953
Table of Allotments,
FM Broadcast Stations.
(Cocoa, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of EZY Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 7142 (1987), proposing the substitution of Channel 257C2 for Channel 257A at Cocoa, Florida, and the modification of its license for Station WEZY-FM to specify operation on the higher powered channel. Comments were filed by the petitioner in which it reiterated its intention to apply for Channel 257C2, if allotted, and by Sean O'Sullivan (O'Sullivan). Reply comments were filed by the petitioner.

2. In proposing the allotment at Cocoa, the *Notice* stated that the Channel 257C2 allotment would require a site restriction of 22.8 kilometers (14.2 miles) northeast of the city to avoid a short-spacing to the application site of Station WQYK-FM, Channel 258C1, St. Petersburg, Florida, and a pending rule making to allot Channel 259C2 to Vero Beach, Florida (MM Docket 86-284). Sullivan believes that Channel 257C2 cannot be used at Cocoa with the 22.8 kilometer site restriction. He states that all land within a ten kilometer radius from the restricted site coordinates appears to be restricted and/or environmentally sensitive U.S. Government property. Specifically, Sullivan submits that the site specified in the *Notice* is within the Cape Canaveral Air Force Station.

3. Petitioner, in its comments, states that the proposed site restriction is excessive. It believes that the restriction as to the St. Petersburg station is based on an application by Station WQYK-FM which has since been superseded by one specifying coordinates which are sufficiently far from Station WEZY-FM's transmitter as to require no site restriction. Petitioner asserts that if any site restriction is needed, it should be no more than 3.3 kilometers (2.05 miles) north to protect the pending Channel 259C2 allotment at Vero Beach.

4. We believe the public interest would be served by substituting Channel 257C2 for Channel 257A at Cocoa, Florida, since it could permit Station WEZY-FM to expand its coverage area. As proposed, we shall modify petitioner license for Station WEZY-FM to specify operation on the higher powered channel. The staff has confirmed that Channel 257C2 can now be allotted to Cocoa in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Thus, the concerns raised by Sullilvan as to the transmitter originally proposed in the *Notice* are moot.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cocoa, Florida	257C2

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of EZY Communications, Inc. for Station WEZY-FM, Cocoa, Florida, IS MODIFIED, effective **October 13, 1988,** to specify operation on Channel 257C2, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 28-21-24 and West Longitude 80-43-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-273

In the Matter of

Amendment of Section 73.606(b), RM-5254
Table of Allotments,
Television Broadcast Stations.
(Panama City Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of G. Weaver Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 51 Fed. Reg. 24877, published July 9, 1986, proposing the allotment of Channel 46 to Panama City Beach, Florida, as the community's first local television allotment. Petitioner filed comments supporting the allotment of a channel to the community. No other comments were received.

2. The *Notice* stated that the allotment of Channel 46 to Panama City Beach required a site restriction of approximately 17 miles southeast in order to avoid a short-spacing to a pending application for Channel 60 at Dothan, Alabama (BPCT-851112KS). However, petitioner states that much of the usable land within the site restricted area is either within or very close to Tyndall Air Force Base. Thus, it believes that the construction of an antenna tower within the site restricted area would not meet with the cooperation or approval of either the Air Force or the Federal Aviation Administration. However, petitioner states that Channel 24 can be allotted to Panama City Beach with a site restriction to the northwest, contingent upon the substitution of Channel 56 for Channel 22 at Panama City, Florida (MM Docket 84-378). It contends that Channel 24 is a preferrable allotment since it avoids the transmitter site problems and also would allow the station to serve more people since the area northwest of Panama City Beach is more heavily populated than the area southeast of the community.

3. In reviewing the record before us, the staff has found that the application of Broadcast Associates, Inc. for Channel 60 at Dothan, Alabama, has been dismissed by the Commission. Therefore, Channel 46 can now be allotted to Panama City Beach in compliance with the Commission's minimum distance separation requirements without a site restriction. The allotment of Channel 24 at Panama City Beach, however, is mutually exclusive with the proposed allotment of Channel 24 to Tallahassee, Florida in MM Docket 87-114, since the two communities are separated by less than the required minimum distance separation.[1] Since Channel 46 can now be allotted without requiring the location of its transmitter in the vicinity of Tyndall Air Force Base, we believe that there would be no public interest benefit derived from comparatively considering the allotment of Channel 24 to Panama City Beach or Tallahassee.

4. Based on the above discussion, we believe the public interest would be served by allotting Channel 46 to Panama City Beach, Florida, since it could provide the community with its first local television service. Channel 46 can be allotted to Panama City Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 13, 1988,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Panama City Beach, Florida	46

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *See* 2 FCC Rcd 2451 (1987). Petitioner stated that it was unaware of the conflict when it suggested the use of Channel 24, but subsequently timely filed its request for use of the channel at Panama City Beach as a counterproposal in MM Docket 87-114. Tallahassee 27--Limited Partnership also filed counterproposal in MM Docket 87-114 requesting the allotment of Channel 24 to Port St. Joe, Florida.

[2] The coordinates for this allotment are North Latitude 30-10-42 and West Longitude 85-48-18. This allotment is not affected by the Commission's temporary freeze on the filing of construction permit applications for vacant allotments in the vicinity of certain metropolitan areas. *See Order*, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-284

In the Matter of

Amendment of Section 73.202(b),	RM-5794
Table of Allotments,	
FM Broadcast Stations.	
(Reidsville, North Carolina, and	
Marion, Virginia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Beasley Broadcasting of Reidsville, North Carolina, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 4591 (1987), proposing the substitution of Channel 271C for Channel 271C1 at Reidsville, North Carolina, and the modification of its license for Station WBIG (formerly WWMO(FM)) to specify the higher powered channel. In addition, an *Order to Show Cause* was directed to Emerald Sound, Inc., licensee of Station WOLD-FM, Marion, Virginia, as to why its license should not be modified from Channel 272A to Channel 273A. Petitioner filed comments reiterating its intention to apply for Channel 271C, if allocated to Reidsville, and Emerald Sound submitted an affidavit agreeing to the change of channel at Marion. No other comments were received.

2. We believe the public interest would be served by allocating Channel 271C to Reidsville since it could provide the community with expanded radio service. As stated in the *Notice*, Channel 271C can be allocated to Reidsville in compliance with the Commission's minimum distance separation requirements. A site restriction of 26.4 kilometers (16.4 miles) west is being imposed on the allotment to accommodate the site specified in petitioner's construction permit (BPH-870114IK). Channel 273A can be allocated to Marion, Virginia, with a site restriction of 7.4 kilometers (4.6 miles) north northwest to accommodate relocation of Station WOLD-FM's transmitter to Walker Mountain.[1] As stated in the *Notice*, the allocation of Channel 273A to Marion was contingent upon grant of a covering license to Station WMYI, Channel 273, at Hendersonville, North Carolina, for the Class C1 facilities specified in its outstanding construction permit (BPH-851213IC). This contingency has now been removed. On July 27, 1988, WMYI was licensed to operate on Channel 273C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Reidsville, North Carolina	271C
Marion, Virginia	230, 273A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Beasley Broadcasting of Reidsville, North Carolina, Inc., for Station WWMO(FM), IS MODIFIED effective **October 13, 1988,** to specify operation on Channel 271C in lieu of Channel 271C1 at Reidsville, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WOLD-FM, Marion, Virginia, IS MODIFIED to specify operation on Channel 273A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WOLD-FM's license, BLH-3962, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3962, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WOLD-FM, as follows: Emerald Sound, Inc., Station WOLD-FM, P.O. Box 31, Marion, Virginia 24354.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 271C at Reidsville are North Latitude 36-16-30 and West Longitude 79-56-34. The coordinates for Channel 273A at Marion are 36-54-05 and West Longitude 81-32-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-432

In the Matter of

Amendment of Section 73.202(b),	RM-6002
Table of Allotments,	
FM Broadcast Stations.	
(Chickasaw, Alabama;	
Quitman, Mississippi	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1988; Released: August 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6377 (1987), issued herein in response to a petition filed by JAB Broadcasting, Inc. (petitioner), licensee of Station WDLT(FM), Channel 252A, Chickasaw, Alabama, proposing the substitution of Channel 252C2 for Channel 252A and modification of its license accordingly. The *Notice* also proposed the substitution of Channel 255A for Channel 252A at Quitman, Mississippi, licensed to Quitman Broacasting Company (Quitman) for Station WYKK-FM, in order to accommodate the proposed substitution at Chickasaw. An *Order to Show Cause* was issued to Station WYKK- FM, directing the licensee to demonstrate why it should not be modified to specify operation on Channel 255A in lieu of Channel 252A.

2. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the requested modified facilities. Additionally, comments were filed on behalf of Capital Broadcasting Corporation ("CBC"), licensee of Station WKSJ-FM, Channel 235C1, Mobile, Alabama,[1] to which petitioner responded. No other comments were received.

3. After evaluating the proposal, we believe the public interest would be served by substituting Channel 252C2 for Channel 252A at Chickasaw, Alabama, since it could provide a first wide-coverage area FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WDLT(FM) to specify operation on Channel 252C2 in lieu of Channel 252A at Chickasaw, Alabama. As indicated in the *Notice*, Channel 252C2 can be allotted to Chickasaw consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 27.3 kilometers (16.9 miles) west[2] of the community to avoid short- spacing to the construction permit issued to Station WKYD-FM, Channel 251C1, Andalusia, Alabama (BMPH-860723IE). [3] Moreover, Channel 255A may be utilized at the current site of Station WYKK-FM at Quitman, Mississippi.[4]

4. Quitman filed no response to the *Order to Show Cause* why the license of Station WYKK-FM should not be modified to specify operation on Channel 255A in lieu of Channel 252A. Accordingly, pursuant to Section 1.87(h) of the Commission's Rules, Quitman is deemed to have consented to the proposed modification.

5. As indicated in the *Notice*, petitioner has agreed to reimburse Station WYKK-FM for the reasonable costs associated with changing its frequency, as required by Commission policy. *See Circleville and Columbus, Ohio*, 9 RR 2d 1579 (1967).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Chickasaw, Alabama	252C2
Quitman, Mississippi	255A

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of JAB Broadcasting Incorporated for Station WDLT(FM), Chickasaw, Alabama, IS MODIFIED, effective **October 13, 1988,** to specify operation on Channel 252C2 in lieu of Channel 252A. subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WYKK-FM, Quitman, Mississippi, IS MODIFIED, effective **October 13, 1988,** to specify operation on Channel 255A in lieu of Channel 252A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-810811AQ except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license BLH-810811AQ except for

the channel as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Quitman Broadcasting Company, Radio Station WYKK-FM, Montrose Road, Quitman, MS 39355.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] CBC's comments are accepted to the extent they support the proposed modification of Station WDLT(FM) to request operation on Channel 252C2. The remainder of those comments direct our attention to a pending suit petitioner has filed in the United States Court of Appeals for the District of Columbia Circuit (Case No. 87-1181), seeking reversal of the Commission's action alloting Channel 254C2 to Pensacola, Florida.

[2] Reference coordinates for Channel 252C2 are 30-47-10 and 88-21-30.

[3] Reference coordinates at the construction permit site of Station WKYD-FM are 30-59-13 and 86-43-08.

[4] Reference coordinates at the licensed site of Station WYKK-FM are 32-03-51 and 88-43-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-45

In the Matter of

Amendment of Section 73.202(b),	RM-6008
Table of Allotments,	
FM Broadcast Stations.	
(Estherville, IA)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1988; Released: August 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Jacobson Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1025 (1988), proposing the substitution of Channel 240A for Channel 240C2 at Estherville, Iowa, and the modification of its license for Station KILR-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, both the staff and petitioner found that the allotment of Channel 240C2 to Estherville required a site restriction of at least 31.5 kilometers (19.6 miles) northwest of the community in order to avoid a short-spacing to Stations KDHL-FM, Fairibault, Minnesota, and to Station KQWC(FM), Webster, Iowa. However, since this distance is too far to assume compliance with the Commission's city-grade coverage requirements, petitioner was requested to provide a study showing that Station KLIR-FM could provide the required 70 dBu signal to all of Estherville from a site meeting the minimum mileage separation requirements. In response, petitioner has provided an engineering study showing that there are transmitter sites which will enable petitioner to meet the mileage separation requirements while providing the entire community of Estherville with the required 70 dBu city-grade service.

3. Based on the above discussion, we believe that the public interest would be served by substituting Channel 240C2 for Channel 240A at Estherville, Iowa, since it could provide the community with its first local wide-coverage area FM service. Channel 240C2 can be allotted to Estherville in compliance with the Commission's minimum distance separation requirements with a site restriction of 29 kilometers (18 miles) northwest.[1] As proposed, we shall also modify petitioner's license for Station KLIR-FM to specify operation on Channel 240C2 in lieu of its present Channel 240A.

4 Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Estherville, Iowa	240C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Jacobson Broadcasting Company, Inc. for Station KLIR-FM, Estherville, Iowa, IS MODIFIED, effective **October 13, 1988,** to specify operation on Channel 240C2 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-35-27 and West Longitude 95-05-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-405

In the Matter of

Amendment of Section 73.202(b), RM-5886
Table of Allotments,
FM Broadcast Stations.
(Spring Hill, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6006 (1987), proposing to allot Channel 275A to Spring Hill, Florida as a first FM channel, at the request of Paul P. Miller (petitioner). Comments in support of the proposal were filed by Thad Lowery and by the petitioner, each stating their intention to apply for use of the channel, if allotted. Comments in opposition to the allotment were filed by Hernando Broadcasting Company (Hernando), licensee of AM Station WWJB, Brooksville, Florida, and reply comments were filed by the petitioner.

2. Hernando, in its comments, opposes the allotment for lack of a suitable non-short spaced site. Hernando contends that the site specified in the *Notice*, 5.5 miles northwest of Spring Hill, is in a low-lying tidal marsh area which is flood prone, contains no access or utility service, and is therefore unsuitable for a broadcast tower.

3. In responsive comments, petitioner agrees with Hernando's allegation that the proposed site and any site further west is unworkable due to the type of terrain in the area. Petitioner claims that his survey of the surrounding area found several locations within two miles of the reference site which could be used to locate a transmitter. Thus, petitioner requests that the Commission make the allotment, using the reference coordinates upon which the *Notice* was based, which could serve to notify potential applicants in which direction to locate their transmitter sites. Petitioner suggests that requests for waiver of Section 73.207 of the Rules could be accepted on a case-by-case basis, up to two miles, in order to meet the spacing requirements to Station WIVY(FM), Jacksonville, Florida, and Station WDUV(FM), Bradenton, Florida. Petitioner suggests that waivers of this magnitude have be granted in the past when the Commission deemed it to be in the public interest, citing *Liberty, Kentucky* 26 RR 2d 1227 (1976), and *Patterson Broadcasting Company* 45 RR 2d 120 (1979). As a final matter, the petitioner points out that only Channel 275A is available for allotment to Spring Hill, and while the allotment may result in some short spaced applications, the allotment, as proposed, is not short spaced.

4. At the time of the *Notice* we assumed that a relatively large area existed for a transmitter site. Petitioner's preferred site at coordinates 28-33-00 and 82-33-00 would not provide the required city grade coverage. Therefore, we proposed a site 8.8 kilometers northwest of the city at coordinates 30-16-34 and 81-33-53. However, as demonstrated in the comments submitted by Hernando and confirmed by the petitioner, the site proposed in the *Notice* is also unusable. In making an allotment we require a reasonable assurance that a site meeting the Commission's spacing requirements would be available. Ordinarily, there is no need to specify a particular site, only that a suitable site area exists. However, based on the information presented by Hernando and confirmed by the petitioner, we find that no site is available for Channel 275A. The coordinates supplied by petitioner for an alternate site would result in a short spacing to either WDUV(FM) at Bradenton or WHVE(FM) at Sarasota, Florida. Petitioner's suggestion of granting the allotment for the site specified in the *Notice*, and allowing each applicant to request a waiver (up to two miles) at the application stage is not an acceptable solution.

5. Thus, in view of the fact that a satisfactory site cannot be found for Channel 275A, we consider it inappropriate to make the requested allotment.

6. Accordingly, IT IS ORDERED, That the petition of Paul P. Miller IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-538

In the Matter of

Amendment of Section 73.202(b), RM-5872
Table of Allotments,
FM Broadcast Stations.
(Searles Valley, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* herein, 2 FCC Rcd 7364 (1987), issued in response to a request filed on behalf of Debra C. Carrigan (petitioner), permittee of Station KJUL(FM), Channel 282C, North Las Vegas, Nevada, proposing the deletion of Channel 283A at Searles Valley, California.[1] Petitioner filed comments reaffirming the need for the requested deletion. No other comments were received.

2. As indicated in the *Notice*, petitioner premises her proposal on a desire to avoid a conflict between Channel 283A at Searles Valley and her application (BMPH-870415IB) to relocate the transmitter for Station KJUL(FM). The distance between the two reference points is 165.7 kilometers,[2] whereas a separation of 169 kilometers is required between first adjacent Class A and C channels. Although petitioner could have requested a waiver of Section 73.207(b) of the Commission's Rules in connection with her application for Station KJUL(FM) to remedy the conflict, she demonstrated there are public interest justifications to merit the requested deletion at Searles Valley.

3. As indicated in the *Notice* herein, petitioner's requested deletion of Channel 283A at Searles Valley is premised on three grounds: (1) that Searles Valley does not qualify as a community for allotment purposes; (2) that FAA considerations are involved; and (3) that the applicants will be unable to provide a 70 dBu signal over the area as a result of FAA imposed constraints. Petitioner claimed that Searles Valley is merely an uninhabited area in the California desert. In support of her claim, petitioner submitted a 7.5 minute United States Geological Survey map showing that at the reference coordinates for Searles Valley, and in an area surrounding those coordinates, nothing but an uninhabited dry lake bed exists. Second, petitioner claims, based on a Federal Aviation Administration (FAA) initial air hazard study for an antenna at the Searles Valley reference coordinates, that an antenna of only 334 feet in height would be permissible to accommodate Channel 283A due to the close proximity of Trona Airport, 6.11 kilometers (3.8 miles) to the North. However, due to the terrain surrounding the Searles Valley reference point, petitioner claims that a tower of 319 meters (1,048 feet) would be required to provide a height above average terrain "HAAT" of 100 meters. The FAA states that such a tower would exceed its obstruction standards.

4. Although Channel 283A was allotted to Searles Valley in MM Docket No. 84-231 on the basis of an expression of interest in receiving a first local service, at that time no issues were raised concerning (1) community status; (2) FAA considerations; or (3) inability to provide city grade coverage.

5. The Census Bureau lists Searles Valley as a Census Designated Place (CDP). [3] However, based on data petitioner extracted from a United States Geological Survey topographic map of the area, the qualifications of Searles Valley as a community for allotment purposes was raised. Therefore, the staff conducted an analysis to determine if Searles Valley is entitled to community status for allotment purposes.

6. As a result of our analysis, we find that the Searles Valley CDP is comprised of the combined areas of Argus, Pioneer Point and Trona, the latter of which is the postal facility for all of those areas. *See Rand McNally Commercial Atlas and Marketing Guide* (1988 Ed.). Therefore, since the U.S. Postal Service does not recognize Searles Valley as a separate area, and since no data has been discovered which indicates that it has any indicia of community life commonly associated with establishing community status (*i. e.*, social, economic or cultural components), we believe it does not qualify as such for allotment purposes.

7. Petitioner's FAA showing cannot be considered as a decisive component of the determination reached herein since the FAA's finding that a proposed tower to accommodate Channel 283A would exceed its obstruction standards was based solely on the reference point used therefor. Moreover, petitioner failed to demonstrate that due to FAA concerns, no alternate site is available to accommodate Channel 283A.

8. On the basis of the above, we believe the public interest will be served by deleting Channel 283A at Searles Valley. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 14, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Searles Valley, as indicated below:

City	Channel No.
Searles Valley, California	--

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 283A was allotted to Searles Valley in MM Docket No. 84-231. Channel 283 is the 80th channel selected for the filing of applications.

[2] Reference coordinates at the application site of Station KJUL(FM) are 35-58-02 and 115-30-06, while those utilized for Channel 283A at Searles Valley are 35-45-00 and 117-19-00.

[3] Although the Census Bureau's listing of Searles Valley as a CDP raises a strong presumption of community status, that presumption is not irrebutable.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-332

In the Matter of

Amendment of Section 73.202(b), RM-5751
Table of Allotments,
FM Broadcast Stations.
(Oildale, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 5328 (1987), issued in response to a petition for rule making filed on behalf of Buckley Broadcasting Corporation of California (petitioner), licensee of Station KLLY(FM), Channel 237A, Oildale, California, proposing the substitution of Channel 237B1 for Channel 237A and modification of its license accordingly. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the requested modified facilities. Comments were also filed by Five Cities Broadcasting, Inc. (Five Cities), licensee of Station KPGA(FM), Channel 237A, Pismo Bech, California, and by Double D Broadcasting Company (Double D), permittee of Station KRAB(FM), Channel 292A, Green Acres, California, to which petitioner responded. No other comments were received.

2. The comments of Five Cities and Double D each sought modification of their Class A facilities, in lieu of the proposed substitution at Oildale. Both of those proposals were found to be techically defective, and were returned by letters as unacceptable for filing. Accordingly, no further discussion on those proposals is warranted herein.

3. On the basis of the foregoing, we believe the public interest would be served by substituting Channel 237B1 for Channel 237A at Oildale, California, since it could provide a first wide coverage area FM station to serve the community. Therefore, and pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KLLY(FM) to specify operation on Channel 237B1 in lieu of Channel 237A at Oildale, California.

4. As indicated in the *Notice*, Channel 237B1 can be allotted to Oildale in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter is sited at least 12.9 kilometers north[1] of the community to avoid short-spacing to Station KBBY(FM), Channel 236B, Ventura, California.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 14, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Oildale, California, as follows:

City	Channel No.
Oildale, California	237B1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Buckley Broadcasting Corporation of California, for Station KLLY(FM), Oildale, California, IS MODIFIED, effective **October 14, 1988,** to specify operation on Channel 237B1 in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates at the restricted site are 35-30-01 and 119-00-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-586

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Hutchinson, Kansas)	RM-6005

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 69 (1988), proposing the allotment of FM Channel 246A to Hutchinson, Kansas, as that community's third FM broadcast service. The *Notice* was issued in response to a petition filed by KWHK Broadcasting Co., Inc. (petitioner). Petitioner filed comments in support of the *Notice*. No other comments were received.

2. Channel 246A can be allotted to Hutchinson, Kansas, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] In view of the fact that the proposed allotment could provide Hutchinson with a third FM broadcast service, we believe the public interest would be served by a grant of the petitioner's request.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 14, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

Community	Channel No.
Hutchinson, Kansas	246A, 271C, 275C

4. The window period for filing applications will open on **October 17, 1988,** and close on **November 16, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 246A are 38-04-54 and 97-55-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-386

In the Matter of

Amendment of Section 73.202(b),	RM-5449
Table of Allotments,	RM-5645
FM Broadcast Stations.	
(Kalkaska and Cadillac,[1]	
Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 1 FCC Rcd 139 (1986), issued in response to a petition for rule making filed by Northern Radio of Michigan, Inc. (petitioner), requesting the substitution of FM Channel 248C2 for Channel 249A at Kalkaska, Michigan. Petitioner also requested the modification of its license for Station WKLT-FM, Channel 249A, to specify operation on the higher class channel. A counterproposal was filed by MacDonald Broadcasting Company.[2] Northern Radio filed comments restating its interest in Channel 248C2. MacDonald Broadcasting Company filed comments in opposition to the *Notice* and comments supporting its counterproposal. Mighty Mac Broadcasting Company filed opposition comments to the counterproposal. Reply comments were filed by Northern Radio, and MacDonald Broadcasting Company filed further opposition comments. [3]

2. The substitution of the higher class channel can be made consistent with the Commission's minimum separation requirements with a site restriction 17 kilometers (10.6 miles) north of Kalkaska.[4] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. We believe the public interest would be served by the substitution of Channel 248C2 for Channel 249A at Kalkaska, Michigan, providing expanded FM service to that community. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WKLT-FM to specify operation on Channel 248C2.

4. We have authorized in paragraph 6 a modification of petitioner's license for Station WKLT-FM, Kalkaska, Michigan, to specify operation on Channel 248C2 in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 14, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kalkaska, Michigan	248C2

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WKLT-FM, Kalkaska, Michigan, IS MODIFIED effective **October 14, 1988,** to specify operation on Channel 248C2, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Accordingly, IT IS ORDERED, That the petition for rule making filed by MacDonald Broadcasting Company proposing the substitution of Channel 247C2 for Channel 244A at Cadillac, Michigan IS HEREBY DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] MacDonald Broadcasting Company filed a separate petition for rule making which was inadvertently accepted as a counterproposal. Although the counterproposal was technically deficient, Public Notice was given on December 19, 1987 (Report No. 1635). MacDonald Broadcasting Company requested the substitution of FM Channel 247C2 for Channel 244A at Cadillac, Michigan. Channel 247C2 at Cadillac is short spaced to existing Channel 249A as well as proposed Channel 248C2 at Kalkaska. MacDonald's counterproposal will be dismissed because it violates the Commission's minimum distance separation requirements.

[3] The following comments were late filed: Response to Northern's Reply Comments and Mighty Mac's Opposition, an Erratum filed by the MacDonald Broadcasting Company; Comments by Northern Radio of Michigan, Inc. and informal comments filed by Mighty Mac Broadcasting Company.

[4] The coordinates used for Channel 244C2 at Kalkaska are 44-53-00 and 85-13-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-144

In the Matter of

Amendment of Section 73.202(b), RM-6167
Table of Allotments,
FM Broadcast Stations.
(Larned, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2187 (1988), proposing the allotment of FM Channel 295A to Larned, Kansas, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Thomas L. Higgins (petitioner). Petitioner filed comments in support of the *Notice*. No other comments were received.

2. Channel 295A can be allotted to Larned, Kansas, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] In view of the fact that the proposed allotment could provide Larned with a second FM broadcast service, we believe the public interest would be served by a grant of the petitioner's request.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 14, 1988** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

Community	Channel No.
Larned, Kansas	244A, 295A

4. The window period for filing applications will open on **October 17, 1988**, and close on **November 16, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 295A at Larned are 38-10-48 and 99-06-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-371

In re Applications of

Aurio Matos d/b/a CHANNEL 50 TELEVISION	File No. BPCT-871125KJ
CARLOS R. SOTO & MARIA V. VILLARUBIA	File No. BPCT-880113KF
Manuel Prats d/b/a AGUADA TELEVISION COMPANY	File No. BPCT-880114KH

For Construction Permit
Aguada, Puerto Rico

HEARING DESIGNATION ORDER

Adopted: July 7, 1988; Released: August 31, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new television station on Channel 50, Aguada, Puerto Rico.[1]

2. The Association of Maximum Service Telecasters (AMST) filed informal objections against each of the applicants[2] on the grounds that each would be short-spaced to the site proposed in the pending application (BPCT-870812KL) of Telemundo Group, Inc. (Telemundo) for a new television station on Channel 42 in Yauco, Puerto Rico.[3] Telemundo's application is mutually exclusive with three competing applications for the Yauco channel and was cut off before the Aguada applications were filed. Since Sections 73.610 and 73.698 of the Commission's Rules require a minimum separation of 31.4 km between a station operating on Channel 50 and one operating on Channel 42, Matos' site would be short-spaced to Telemundo's site by 2.4 km, Soto would be short-spaced by 3.6 km, and Prats by 1.2 km. Matos has requested a waiver of the Rules; Soto and Prats have not. An issue will be specified to determine whether circumstances exist which would warrant waiver of Sections 73.610 and 73.698 of the Rules.

3. Aurio Matos, Sr., sole proprietor of Channel 50 Television, is also the owner of Station WRFE(FM), Aguada, Puerto Rico. Section 73.3555(b)(2) of the Commission Rules proscribes common ownership, operation or control of a television station and an FM station if the principal community of the FM station would be within the Grade A contour of the television station. Mr. Matos filed a conditional divesture statement. He pledges to divest his interest in the FM station if another mutually exclusive application is filed for his television proposal. If no other mutually exclusive application is filed, Mr. Matos requests that he be permitted to continue to own the FM station presumably pursuant to Note 4 to Section 73.3535 of the Commission's Rules. Since two competing applications for Channel 50 have been filed, we will construe Mr. Matos statement as a pledge to divest. Accordingly, any grant of Matos' application will be conditioned upon his divestiture of all interest in, and connection with WRFE(FM), Aguada, Puerto Rico.[4]

4. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Prats has not submitted such a certification. Accordingly, Prats will be given 30 days from the date of release of this Order to file such a certification, in the form required by the Commission, with the presiding Administrative Law Judge. If the applicant cannot make the certification, Prats shall so advice the Administrative Law Judge who shall then specify an appropriate issue.

5. The technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as indicated by the issues specified below, the applicants are qualified to operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to each of the applicants, whether its proposal is consistent with Sections 73.610 and 73.698 of the Commission's Rules and, if not, whether circumstances exist which would warrant waiver of the rules.

2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That in the event of a grant of the application of Channel 50 Television, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Aurio Matos, Sr. has divested himself of all interest in and connection with Station WFRE(FM), Aguada, Puerto Rico.

9. IT IS FURTHER ORDERED, That Manuel Prats shall, within 30 days after the release of this Order, file with the presiding Administrative Law Judge, a site availability certification, in the form required by the Commission, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

10. IT IS FURTHER ORDERED, That the Association of Maximum Service Telecasters IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

12. IT IS FURTHER ORDERED, That the amendment filed by Manual Prats on March 3, 1988, is accepted for filing.

13. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Counsel for Manuel Prats filed an unsigned amendment to Mr. Prats' application on March 1, 1988, stating that the signed amendment would be filed as soon as it was received in Counsel's Washington, D.C. Office. The executed "amendment request" was filed on March 3, 1988. Since the competing applicants had full notice of the nature of the amendment on the cut-off date for minor amendment, none of them would be prejudiced by the exceptance of the executed amendment. Accordingly, the March 3, 1988 minor amendment filed by Manuel Prats will be accepted for filing.

[2] AMST filed its objections against Matos on January 11, 1988; against Soto/Villarubia on March 1, 1988; and against Prats on May 4, 1988.

[3] The Commision's own study reveals that Matos' site would be 29 km from Telemundo's site, Soto's site would be 27.8 km from Telemundo's site, and Prats' site would be 30.2 km from Telemundo's site.

[4] Mr. Matos is put on notice, however, that while his pledge to divest obviates the need for a hearing on the issue of his ownership of a television and radio station in the same community, we make no finding with respect to whether or not, pursuant to Note 4 to Section 73.3535, the public interest would be served by permitting the ownership of both stations in the same community. Therefore, if this case is settled by the parties or otherwise resolved without a hearing, and Mr. Matos is the successful applicant, the divestiture condition shall attach to the construction permit.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-393

In re applications

TREE TOP BROADCASTING ASSOCIATES (hereafter Tree Top)	File No. BPH-860121MR
EDWARD F. AND PAMELA J. LEVINE, JOINT TENANTS (hereafter Levines)	File No. BPH-860122MI
PN RADIO COMPANY (hereafter PN)	File No. BPH-860123MN
1180 WHAM CORP. (hereafter 1180 Wham)	File No. BPH-860123MO
ELLIOTT BROADCASTING, LIMITED PARTNERSHIP (hereafter Elliott)	File No. BPH-860123MP
FM ARLINGTON LIMITED PARTNERSHIP (hereafter FMALP)	File No. BPH-860123MQ
EGMONT SONDERLING (hereafter Sonderling)	File No. BPH-860123MR
RIZZI, RIZZI, WIGGINS AND CHAPIN, GENERAL PARTNERSHIP (hereafter Rizzi)	File No. BPH-860123MT
DUTCHESS BROADCASTING CORPORATION (hereafter Dutchess)	File No. BPH-860123MU

For a Construction Permit For a
New FM Station in Arlington, New York at
Channel 245A

HEARING DESIGNATION ORDER

Adopted: July 20, 1988; Released: August 31, 1988

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. Elliott has filed petitions to deny against Tree Top and FMALP. Elliott alleges that both Tree Top and FMALP, who propose to mount on the same existing tower, specify the wrong coordinates for their proposed sites and thus the applications are unacceptable.

3. Both Tree Top and FMALP filed timely oppositions to Elliott's petitions to deny. Tree Top alleges in its opposition that it had amended its application in a timely manner to reflect the correct coordinates. Section 73.3522(a)(6) of the Commission's Rules allows the filing of amendments as a matter of right "[f]or a period of 30 days following the issuance of a public notice announcing the acceptance of the application for tender." Section 1.4(a) of the Commission's Rules dictates that "the first day to be counted in computing the terminal date is the day after the day on which the act, event or default occurs." The operative date for which the "day on which the act . . . occurs" for our purposes of computing time as dictated in the above-referenced Section 1.4(a) of the Commission's Rules, commences at 3:00 p.m. Eastern Time on the day after the date on which the descriptive *Public Notice* is released. *See* 47 C.F.R. § 1.4(b).

4. The *Public Notice of Tenderability* for Tree Top's application was issued on February 4, 1986. By the above-referenced sections, the *Public Notice* is treated as though it were released at 3:00 p.m. on February 5, 1986 and therefore, the date which begins the 30 day computation is February 6, 1986, which would give Tree Top until March 7, 1986 to file amendments as matter of right. Tree Top's amendment specifying the correct coordinates for its antenna site was filed on March 7, 1986 and was thus timely. Finding that Tree Top's application was amended in a timely manner, Elliott's petition to deny will herein be denied.

5. On August 19, 1986, FMALP also filed a timely opposition to Elliott's petition. FMALP states in its opposition to petition to deny that it had "a firm basis for relying on the coordinates specified in its application." This firm basis, FMALP explains, was based upon an assurance from the land owner of the tower site that the coordinates were correct. Further, FMALP alleges that the Commission's records for the broadcast translator station W204AE, which is licensed to use the same tower, also contain the coordinates used by FMALP.

6. Elliott counters in its August 26, 1987 reply to opposition to petition to deny that the land owner informed all applicants planning to use his site by letter dated January 27, 1986, that the original coordinates given were incorrect and advised the applicants of the correct coordinates. Elliott further contends that because of this updated information from the land owner all the other applicants amended their applications, so FMALP cannot claim to have "a firm basis for relying" on the coordinates specified in its application. Elliott concludes by arguing that pursuant to *Public Notice*, FCC Mimeo No. 4580, released May 16, 1985, the correct coordinates are a necessary factor in the determination of acceptability.

7. Pursuant to Appendix D of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936, May 13, 1985 (*Report and Order)* the Commission will not return or dismiss an application "if the needed information can be derived . . . confidently and reliably drawing on the application as a whole." In the instant case, FMALP proposes to mount on an existing tower. Thus, the Commission can competently determine the correct site coordinates from information currently in the Commission's records. This is consistent with Commission policy. Correct coordinates are necessary to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. When the proposed site involves the use of an existing tower, the Commission can make these determinations. Therefore, the petition to deny filed by Elliott against FMALP will herein be denied.

8. On September 4, 1987, FMALP filed a petition for leave to file supplemental opposition to petition to deny accompanied with a supplemental opposition. In lieu of the action taken herein above, the petition will be denied and the supplemental opposition will be returned as moot.

9. On September 11, 1987, FMALP filed a petition for leave to amend accompanied with an amendment specifying the correct coordinates for the transmitter site. In its petition, FMALP argues that it has "good cause" for being allowed a late-filed amendment. FMALP argues the circumstances establishing good cause are that it was not aware that the coordinates in its application were incorrect and it was not made aware that its application specified incorrect coordinates until the fact was pointed out in Elliott's petitions. On September 22, 1987, Elliott filed a timely opposition to FMALP's petition for leave to amend. Elliott argues that FMALP has failed to show good cause for the acceptance of its late-filed amendment. Elliott asserts that FMALP did not exert due diligence in ascertaining the facts contained in its application. In previous circumstances where an applicant has proposed to utilize an existing tower, the Commission has requested and accepted amendments from the applicant as late as the Hearing Designation Order. *See FPS Broadcasting Group*, DA 88- 824, MM Docket No. 88-280, released June 14, 1988. Since FMALP proposes an existing site, the Commission can confidently and reliably make the technical determinations necessary. FMALP's petition for leave to amend will therefore be herein granted and the accompanying amendment will herein be accepted.

10. *Site Elevation Discrepancy.* Tree Top, PN, 1180 Wham, Elliott, Sonderling, Rizzi and Dutchess indicated that they desire to locate their antenna on an existing tower which is currently utilized by several non- commercial translators located at 41' 43' 11" N. latitude and 73' 59' 45" W. longitude. According to the Commission's data base, the proper tower heights for this tower are 300 feet above ground level (AGL) and 1410 feet above mean sea level (AMSL). However, the above noted applicants list the existing tower heights as 300 feet AGL and 1400 feet AMSL in Section V-G, Item 5 of their respective applications. Therefore, the applicants' tower height AMSL values are 10 feet lower than the tower height AMSL value found in the Commission's records. In addition, FMALP, which is also planning to locate on the existing tower noted above, lists tower height values of 300 feet AGL and 1408 feet AMSL in Section V-G, Item 5 of its application. Therefore, FMALP listed a tower height AMSL 2 feet lower than that found in the Commission's records. Because these applicants clearly propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the applications in question, the staff could "drawing on the application[s] as a whole," pursuant to Appendix D of the *Report and Order, supra*, confidently and reliably verify the transmitter location by taking official notice of the site coordinates and tower heights AGL as found in the Commission's files for the licensed co-located facility. Accordingly, all eight of the above noted applicants are required to submit amendments to their applications resolving their tower height AMSL discrepancy by reflecting the correct response to Section V-G, Item 5 of their FCC Form 301. These amendments must be submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *PN.* Broadcast Data Corporation is a general partner in PN, owning 49% of the partnership interest. With respect to Broadcast Data Corp., PN has stated in Exhibit II-1 of its application that:

> "[i]n an action relative to Broadcast Data Corp.'s parent company, Graphic Scanning Corp., by Order released August 24, 1982 (FCC-391) the Commission designated for hearing applications filed by A.S.D. Answer Service, Inc.; B.W. Communications, Inc.; and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party in interest in the applicants. In an Initial Decision released January 9, 1985, the presiding Administrative Law Judge concluded a) that, because of the nontraditional nature of the transactions involved, Graphic shall be deemed the real party in interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission.

12. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion and Order*, released November 21, 1986, the Commission approved such an agreement and vacated the conclusions reached in the *Initial Decision*. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, active in management at the time of the alleged misconduct, were to regain control of Graphic. *A. S. D. Answer Services, Inc. et. al.*, 1 FCC Rcd 753 (1986). A petition for reconsideration of this action has been filed. The decision has also been appealed to the United States Court of Appeals for the District of Columbia Circuit (*Mobilephone of Northeastern Pennsylvania, Inc. V. FCC*, U.S. App. D.C., Case No. 86-1663, filed December 5, 1986; *Barry Yampol v. FCC*, U.S. App. D.C., Case No. 86-1705, filed December 19, 1986). These appeals have been stayed until the petition for reconsideration filed above has been acted on by the Commission.

13. *Section II / Item 5.* PN is also an applicant in the Fargo, North Dakota proceeding which was designated for hearing on June 18, 1987 (MM Docket 87-177). In the designation Order, PN was required to file an amendment

specifying "all officers and directors, and all persons or entities who are the beneficial or record owners or have the right to vote any capital stock, membership or owner interest, or subscribers to such interests," as required by Section II, Item 5 since PN's Fargo application only listed corporate entities in response to that Item. PN's Arlington application also only listed corporate entities Private Network Radio, Inc. and Broadcast Data Corp. (BDC) in response to Section II, Item 5. On September 30, 1987, taking notice of the ordering clause in the Fargo proceeding, PN also amended its Arlington application. However, the amendment still does not satisfy the requirements of Section II, Item 5. The amendment does name all the voting principals of Private Networks, Inc., but as for BDC, the amendment merely states that BDC is wholly owned by Graphic Scanning Corp. and lists the directors of Graphic Scanning. The Commission still needs to know "all persons . . . or record owners [of Graphic Scanning, Corp.] who have the right to vote." Accordingly, PN will be ordered to file an amendment specifying the voting ownership of Graphic Scanning Corp. within 30 days of the release of this Order with the presiding Administrative Law Judge.

14. *Section II / Item 9*. Section II, Item 9 of FCC Form 301 requires applicants to provide documents, instruments, contracts or understandings which exist relating to ownership or future ownership rights. While PN has provided an exhibit in response to its "Yes" answer to this item, the exhibit notes only in very general terms the existence of a general partnership agreement and the fact that the rights and obligations of the parties are specified in that agreement. Accordingly, PN will be required to amend its response to specify the particulars of its partnership agreement as it relates to ownership or future ownership rights.

15. *PN and Sonderling*. PN and Sonderling state in Section V-B, Item 7 that a directional antenna is not being proposed. However, a directional antenna pattern was submitted by each (Figure 1 in both applications) and the field strength contours depicted by each on their respective coverage maps were clearly plotted utilizing the directional antenna pattern (Figure 6 in both applications). This is not considered a tenderablity defect because, "drawing upon the application as a whole" we can confidently and reliably determine that a directional antenna is being proposed. Accordingly, PN and Sonderling will be required to amend Section V-B, Item 7 of their FCC Forms 301 to indicate that a directional antenna is being proposed.

16. *Elliott*. Elliott indicates that the applicant is a limited partnership. In *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), the Commission stated that henceforth limited partnership interests were not attributable for the purposes of the multiple ownership rules, if the applicant certifies that, by the terms of the partnership agreement, the limited partners will "not be involved in any material respect in the management or operation of" the proposed station, 97 FCC 2d at 1023. The Commission defined the degree of noninvolvement in paragraphs 48-50 of the June 24 decision of reconsideration. Elliott must submit the necessary certification and showing that the limited partnership interests are held only by individuals or entities that are sufficiently insulated. If the certification or showing is not appropriate, of course, the necessary information required by Section 73.3514(a) of the Commission's Rules as to them would have to be filed as an amendment. Further, the Commission retained the cross-interest policy as to other attributable media interests in the same area. *Id.* at 1030. Accordingly, Elliott will be required either to state that the limited partners have or will have no other media interests subject to the cross-interest policy or identify the limited partners with such interests, identify the other local media and state the nature or extent of the ownership interest.

17. *FMALP*. In its October 29, 1987 amendment, FMALP reported that financial qualification and certification issues had been designated against FM Grove City Limited Partnership (File No. BPH-851216MS) in the Grove City, Ohio FM proceeding. FM America Corp., which is the 80% limited partner of FMALP, is also the 80% limited partner of FM Grove City Limited Partnership. The still unresolved issues specified in Grove City were:

> To determine whether FM Grove City Limited Partnership has sufficient net liquid assets available to construct and operate its proposed station in view of the other broadcast construction and operation financial commitments of its limited partner, FM America Corporation.
>
> To determine, in light of the evidence adduced under the preceding issue, whether FM Grove City Limited Partnership misrepresented facts or lacked candor in certifying its financial abilities to construct and operate the proposed station; and
>
> To determine, in light of the determination of the preceding issues, whether FM Grove City Limited Partnership possesses the requisite financial and basic qualifications to be a Commission licensee.

Order in MM Docket 87-178, FCC 87M-2171, released September 11, 1987.

18. In its February 10, 1988 amendment, FMALP reports that the same above issues were specified in the Irondequoit, New York proceeding involving FM Irondequoit Limited Partnership (File No. BPH-861126MW); the Charleston, South Carolina proceeding involving FM Charleston Limited Partnership (File No. BPH-860203OD); the Orlando, Florida proceeding involving FM Orlando Limited Partnership (File No. BPH-860507OA) and the Montecito, California proceeding involving FM Montecito Limited Partnership (File No. BPH-860102NP). FM America is an 80% limited partner in all of these applications. In the *Memorandum Opinion and Order*, FCC 87M-3289, released December 16, 1987, the presiding Administrative Law Judge found FM Montecito Limited Partnership to be financially qualified. FMALP asserts that this finding is sufficient to substantiate the financial certifications in all of FM America's applications. The Administrative Law Judge's finding in Montecito, however, relates directly only to FM Montecito Limited Partnership and not FMALP nor any of the other aforementioned, still unresolved, specified cases.

19. In its April 18, 1988 amendment, FMALP submits an Order finding FM Irondequoit Limited Partnership financially qualified in the Irondequoit, New York proceeding. *Memorandum Opinion and Order*, MM Docket 87-517, FCC 88M-1029, released April 8, 1988. The judge's Order summarily dismissing the financial issue was limited to FM Irondequoit only, and thus has no bearing on FMALP's application. The Commission requires that

every applicant have available sufficient financial resources to construct and operate simultaneously *all* of the stations for which applications are pending. *See e. g., Nelson Broadcasting Company*, 4 RR 2d 87 (Rev. Bd. 1964). Furthermore, these resources must have been available to the applicant at the time of filing the application.

20. Furthermore, pursuant to its request, the application of FM Grove City Limited Partnership was dismissed by *Order*, FCC 87M-2532, released October 13, 1987, prior to the resolution of the above issues. Since FM America Corp. is also the limited partner in FMALP's application, these unresolved questions cast uncertainty upon whether FMALP is qualified to be a Commission licensee. Therefore, appropriate issues will be specified below.

21. *Dutchess*. In its March 20, 1987 amendment, Dutchess informs the Commission that its sole officer and director, Richard D. Novik has acquired an interest in Dutchess Communications Corporation (DCC), an entity which is separate and distinct from Dutchess Broadcasting Corporation. DCC is the permitee of WLMS-FM, a yet unbuilt station in Poughkeepsie, New York. Novik has certified that he will divest his interest in WLMS should the Arlington application be granted. Since an ownership interest in WLMS would violate the Commission's multiple ownership rules, an ordering clause will be added requiring Novik to divest, should the Arlington application be granted.

22. *Other Matters*. The applicants below have petitioned for leave to amend their applications. Each of the accompanying amendments were filed after the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, any applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
PN	August 12, 1987, September 30, 1987
	October 30, 1987, November 19, 1987
	December 21, 1987, January 14, 1988
	February 1, 1988, April 18, 1988
	April 28, 1988, June 6, 1988
1180 Wham	August 8, 1986, February 17, 1987
FMALP	March 28, 1986, June 5, 1986
	August 13, 1986, February 13, 1987
	August 14, 1987, September 11, 1987 (engineering)
	October 29, 1987, February 10, 1988
	April 18, 1988,
Sonderling	January 30, 1987, May 26, 1987
Dutchess	August 1, 1986, March 20, 1987

23. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative preference should accrue to any of the applicants.

24. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

25. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether FMALP has sufficient net liquid assets available to construct and operate its proposed station in view of the other broadcast construction and operation financial commitments of its limited partner, FM America Corporation;

(b) To determine, in light of the evidence adduced under the preceding issue, whether FMALP misrepresented facts or lacked candor in certifying its financial abilities to construct and operate the proposed station.

(c) To determine, in light of the determination of the preceding issues, whether FMALP possesses the requisite financial and basic character qualifications to be a Commission licensee;

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

26. IT IS FURTHER ORDERED, That the petitions to deny filed by Elliott against Tree Top and FMALP are HEREBY DENIED.

27. IT IS FURTHER ORDERED, That the September 4, 1987 petition to file supplemental opposition to petition to deny IS HEREBY DENIED and the supplemental opposition IS HEREBY RETURNED AS MOOT.

28. IT IS FURTHER ORDERED, That Tree Top, PN, 1180 Wham, Elliott, FMALP, Sonderling, Rizzi and Dutchess all file an amendment resolving their tower height AMSL discrepancy reflected in Section V-G, Item 5 of their FCC Forms 301 with the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to PN as a result of this proceeding, its grant will be without prejudice to (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; or in light of the outcome of (ii) the appeal in *AS. D. Answer Service, Inc. et al.*, CC Docket No. 82-587 et seq.

30. IT IS FURTHER ORDERED, That PN shall file an amendment of Section II, Item 5 of FCC Form 301 to provide information required as to the parties to the applicant associated with Graphic Scanning Corp. with the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That PN shall file an amendment of Section II, Item 9 of FCC Form 301 to provide the particulars of its partnership agreement as it

relates to ownership or future ownership rights with the presiding Administrative Law Judge within 30 days of the release of this Order.

32. IT IS FURTHER ORDERED, That PN and Sonderling shall file amendments of Section V-B, Item 7 to specify that a directional antenna is being proposed with the presiding Administrative Law Judge within 30 days of the release of this Order.

33. IT IS FURTHER ORDERED, That Elliott shall submit the certification, statement and/or information required by paragraph 16, *supra*, to the presiding Administrative Law Judge, within 30 days after the release of this Order.

34. IT IS FURTHER ORDERED, That if the application of Dutchess is granted, prior to commencing Program Test Authority, Novik will be required to divest himself of all interest in and connection with Station WLMS-FM.

35. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by PN, 1180 Wham, FMALP, Sonderling and Dutchess ARE HEREBY GRANTED, and the accompanying amendments ARE HEREBY ACCEPTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

37. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

38. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-394

In re Applications of

MR. VINCENT BOSQUEZ d/b/a WESTWIND RADIO COMPANY (hereafter Westwind)	File No. BPH-870311MF
MORONGO BASIN BROADCASTING CORPORATION (hereafter Morongo)	File No. BPH-870311MI
COURTNEY L. FLATAU (hereafter Flatau)	File No. ARN-870310MG [Dismissed Previously]

For Construction Permit for a
New FM Station, Channel 299A, 107.7 MHz
Twentynine Palms, California

HEARING DESIGNATION ORDER

Adopted: July 20, 1988; Released: September 1, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On January 4, 1988, Flatau filed a petition for reconsideration and request for reinstatement *nunc pro tunc* of the November 23, 1987 action by the Chief, FM Branch which returned his application for proposing facilities in excess of those allowed under the United States and Mexican Broadcasting Agreement. Flatau also filed an amendment to remedy the deficiency in his application. Flatau first alleges in his petition that his application was "substantially complete" as filed, in that it met all of the Commission's criteria for tender and all applicable technical rules for acceptance as enunciated in the Commission's *Statement of New Policy Regarding Commercial FM Applications That Are not Substantially Complete or Are Otherwise Defective*, 50 Fed. Reg. 19945 (1985). Secondly, the Commission failed to provide notice of the requirement that applicants for FM broadcast stations must comply with Annex IV to the United States - Mexican Agreement. Finally, the failure of Flatau's application to conform to Annex IV is a minor defect, not rendering the application incomplete in accordance with 47 C.F.R. § 73.3564, and as such, good cause exists for acceptance of an amendment to Flatau's application which was filed simultaneously with the petition for reconsideration.

3. On November 9, 1972, the United States of America and the United Mexican States signed on behalf of their respective countries an agreement regarding FM broadcasting within the Mexican-American "border area".[1] This agreement, *inter alia*, imposed limitations on power, height and proximity of FM stations in the border area. For class A stations, the limit was set at 3 kW ERP at 300 feet (rounded to 90 meters) HAAT or the equivalent. Thus, the Mexican Agreement became part of the governing law of the United States and it could not be waived, altered or canceled except by replacement with a new agreement or with notice of termination served through diplomatic channels. The Commission itself has no authority to waive the terms of an international treaty, and certainly no member of the Commission's staff may do so in processing an application. *1010 Broadcasting* 59 RR2d 1124, 1126 (1986).

4. Contrary to Flatau's assertion, compliance with the U.S. - Mexican Agreement is part of the Commission's acceptability criteria. Noncompliance with the Agreement results in noncompliance with the Commission's technical standards utilized to determine acceptability criteria. There are several references to Mexican and Canadian Agreements contained in the Commission's Rules and processing guidelines. For example, in the *Report and Order* in MM Docket 80-90, 94 FCC2d 152 (1983), the Commission stated, "[t]hose allotments and assignments which are within 320 kilometers (199 miles) of the Canadian and Mexican border must conform to the requirements specified in the FM Broadcast Agreement existing between the United States and the respective country." In discussing the engineering data necessary to perform an acceptability study under our revised FM application processing procedures, the Commission stated that "[i]nternational agreements also influence permissible ERP levels in border areas." *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D). Appendix D to the *Report and Order* in MM Docket 84-750 was also released as a separate *Public Notice*, Mimeo No. 4580 (May 16, 1985), to ensure applicants were well advised of these procedures. Additionally, 47 C.F.R. § 73.204 (International Agreements and Other Restrictions in the Use of Channels) provides a cross reference to 47 C.F.R. § 73.1650(b) which states that "the U.S.A. is signatory to separate, bilateral agreements covering FM broadcast stations with the government of . . . Mexico." 47 C.F.R. § 73.1650(d) states that copies of all such agreements are available for inspection at the office of the Chief, Mass Media Bureau, and can be purchased from the FCC's duplication contractor through the Commission's Consumer Assistance Office. We also note that the Instructions to FCC Form 301 caution that applicants should "have on hand and be familiar with," *inter alia*, part 73 of the Rules.

5. As evidenced by the above discussion, Flatau had an abundance of notification of the requirements of the U. S. - Mexican Agreement. Furthermore, the fact that applicants may have no actual knowledge of the detailed terms of the agreement does not excuse noncompliance. *See* , e.g. *Stearns County Broadcasting*, 104 FCC 2d 688, 696 (Rev. Bd. 1986). *See also Paul A. Stewart Enterprises*, 45 FCC 773, 778 (1965). Thus, it was incumbent upon the applicant here to review all pertinent requirements before

filing to ensure compliance. Flatau also believes that reliance on the *Public Notice* of December 23, 1985 concerning Annex IV requirements of the U.S. - Mexican Agreement is "irreconcilable" with *Salzer* v. *F. C. C.*, 778 F.2d 869, 875 (D.C. Cir. 1985). Specifically, Flatau argues that Annex IV requirements are invalid as a matter of law because the Annex was never published in the Federal Register. Thus, Flatau asserts, there was inadequate notice under both the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(C), and *Salzer*. Flatau's reliance on *Salzer* is misplaced. That case upheld the adoption of new, strict standards governing the acceptability of LPTV applications, but voided certain requirements which, in the opinion of the Court, were "not accomplished by full and explicit notice of all prerequisites for such consideration." 778 F.2d at 871-72. The U.S. - Mexican Agreement was concluded in 1972 and the Annex IV was published immediately thereafter. Thus, the requirements of the Annex have been available to Flatau for fifteen years prior to the filing of his application. Furthermore, in the present case, as noted above, cautionary statements in the *Report and Orders* in both MM Dockets 80-90 and 84-750 regarding the applicability of the U.S. Mexican agreement were published in the Federal Register as early as four years prior to the filing of Flatau's application. Thus, the Commission has duly applied the tenets of the Administrative Procedures Act.

6. Finally, Flatau argues that for the above-stated reasons, the Commission should accept its concurrently filed curative amendment. We disagree. In the *Report and Order* in MM Docket 84-750, *supra*, the Commission adopted new "hard look" procedures for the processing of FM applications and set forth specific criteria relevant to a determination that an application is sufficient for tender. Thereafter, once "an application [is] found to be sufficient for tender [it] will be studied to determine its acceptability for filing . . . ." *Id.* at 19946. Applications are unacceptable for filing if, *inter alia*, they fail to comply with international broadcasting agreements. *See* , *1010 Broadcasting*, *supra*, and *In re Application of National Association for Broadcast Entertainment and Education*, FCC 84-624, Released December 18, 1984, and *Kerrville Radio*, 2 FCC Rcd 3441 (1987).

7. Under the new "window" processing rules adopted in MM Docket 84-750, an applicant is provided a 30-day period (running from the release of a *Public Notice* announcing the tenderability of the application)[2] to perfect its application for filing. Afterward, the filing of amendments is severely constrained. 50 Fed. Reg. at 19941. These constraints are set forth in 47 C.F.R. § 73.3522(a)(6):

> [Commercial FM applications] may be amended as a matter of right during the appropriate [filing] window . . . For a period of 30 days following the FCC's issuance of a Notice of Tenderability announcing the acceptance of the applications [for tender], amendments that go to the acceptability or grantability of an application may be filed as a matter of right. Subsequent [predesignation] amendments . . . will be considered only upon a showing of good cause for late filing or pursuant to 47 C.F.R. Section 1.65 or [47 C.F.R.] Section 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration . . .

8. Thus, except in certain circumstances, [3] not pertinent here, predesignation amendments going to acceptability are not permitted after 30 days from the issuance of the *Public Notice* announcing the acceptance for tender of a given application. *See PrimeMedia Broadcasting Inc.*, FCC 88-218, released July 12, 1988. Flatau's corrective amendment is thus untimely and will be returned.

9. Finally, in returning Flatau's application, the Chief, FM Branch stated, "[y]ou propose 0.12 kW and 497 meters HAAT but are limited to 0.02 kW and 497 meters." Flatau's petition indicates that the maximum value of 0.02 kW stated in the letter of the Chief, FM Branch was incorrect according to the Annex IV curves of the Bilateral Agreement. Further engineering review indicates that the correct maximum value should have been 0.08 kW. Nevertheless, Flatau's facilities, as originally filed, remain in excess of those allowable under the Agreement. Thus, while the maximum allowable power was incorrectly stated in the November 23, 1987 letter of the Chief, FM Branch, the action which resulted in the return of Flatau's application as unacceptable for filing was correct.

10. Accordingly, since adequate notice was provided of both the FM processing standards and the power/height limits imposed by the Mexican Agreement, and since Flatau has provided no grounds to justify a deviation from the Commission's FM processing standards, its petition for reconsideration will be denied.

11. *Westwind*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Westwind would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

12. *Morongo*. On January 19, 1988, Morongo filed an amendment pursuant to 47 C.F.R. § 1.65 (see paragraph No. 12, below) indicating that Mr. Gary J. Daigneault, a principal of the applicant, had become the news director, and that he continues to host a weekly talk show, for KDHI (AM) and KQYN (FM), licensed to Hi-Desert Communications, Inc. at Twentynine Palms, California. The amendment also stated that Mrs. Cynthia M. Daigneault, a principal of the applicant, had reassumed the position of sales manager for these stations. Both of these individuals have stated their intention to terminate their employment at KDHI-KQYN in the event a construction permit is awarded in this proceeding to Morongo. Accordingly, an appropriate condition will be specified.

13. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Morongo	January 19, 1988
	February 3, 1988 (engineering)

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the propos-

als. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Westwind would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

17. IT IS FURTHER ORDERED, That in light of the discussion contained in paragraphs 2-9 above, the petition for reconsideration filed by Flatau IS DENIED and the associated amendment IS RETURNED AS UNACCEPTABLE FOR FILING.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That in the event a construction permit in this proceeding is awarded to Morongo, Mr. Gary J. Daigneault and Mrs. Cynthia M. Daigneault will terminate their employment at KDHI (AM) and KQYN (FM), licensed to Hi-Desert Communications, Inc., Twentynine Palms, California prior to the commencement of program test authority.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Morongo (January 19, 1988), (February 3, 1988).

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This is "[t]he territory included within 199 miles (320 kilometer) strips on each side of the common border." 24 U.S.T. at 1826.

[2] Such a notice for the applications filed for Twentynine Palms, California was released on April 15, 1987.

[3] Late filed predesignation amendments will be considered only upon a showing of good cause or pursuant to 47 C.F.R. § 1.65, which requires prompt amendment to reflect significant changes in information previously given in an application or pursuant to 47 C.F.R. § 73.3514.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-609

In the Matter of

Amendment of Section 73.606(b), RM-6028
Table of Allotments,
TV Broadcast Stations.
(Grenada, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 12, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of J. Boyd Ingram (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 258 (1988), proposing the allotment of UHF Television Channel 22+ to Grenada, Mississippi, as that community's first local television service. Petitioner filed comments reiterating his intention to apply for the channel. No other comments were received. Channel 22+ can be allotted to Grenada in compliance with the Commission's minimum distance separation requirements provided there is a site restriction 20 kilometers (12.5 miles) northeast of the community.[1] The site restriction will prevent a conflict with Station WHLT, Channel 22, Hattiesburg, Mississippi and with Channel *21 (vacant), Clarksdale, Mississippi.

2. We believe the public interest would be served by allotting Channel 22+ to Grenada, since it could provide the community with its first local television service.[2] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Grenada, Mississippi	22+

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 22+ at Grenada are 33-54-59 and 89-40-28.

[2] Although the Commission has recently imposed a freeze on television allotments in certain metropolitan areas, Grenada is not affected as this proposal is not within the prohibited co-channel distance of any of the specified communities. *See Order*, 52 FR 28346 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-596

In the Matter of

Amendment of Section 73.202(b),	RM-5975
Table of Allotments,	RM-6323
FM Broadcast Stations.	
(El Dorado and Kingman,[1]	
Kansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 5, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. In response to a petition for rule making filed by KIKZ, Inc., former licensee of FM Station KBUZ, Channel 257A, El Dorado, Kansas, the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 151 (1988), proposing the substitution of FM Channel 256C2 for Channel 257A at El Dorado, Kansas. KIKZ, Inc. also requested modification of its license for Station KBUZ to specify operation on Channel 256C2.[2] Ronald G. Bliss, d/b/a Bliss Communications, permittee of FM Channel 257A at Kingman, Kansas, filed a counterproposal requesting that Channel 256C2 be substituted for Channel 257A at Kingman, and its construction permit for Channel 257A be modified to specify operation on Channel 256C2.[3] Gary Violet filed comments affirming his interest in the Class C2 channel at El Dorado, and reply comments in response to the counterproposal filed by Bliss Communications.

2. Bliss Communications, in support of its petition, states that substitution of Channel 256C2 for Channel 257A at Kingman would not only improve service to the residents of Kingman but increase its coverage to Medicine Lodge, Anthony, Harper and many other small communities southwest of Kingman. According to Bliss Communications, these small communities are now served by only two "marginal" signals under the same ownership.

3. In reply comments, Gary Violet argues that El Dorado should be preferred over Kingman because the population of El Dorado and the proposed service area is substantially greater than the population of the proposed Kingman allotment. Gary Violet notes that since there are no other comparative priorities such as first or second aural service or first local service, the respective populations are determinative. Accordingly, Gary Violet states that Channel 256C2 should be assigned to El Dorado. Gary Violet also notes that Kingman is eligible for other Class C2 channels such as Channel 262C2 or 295C2. In this regard, Gary Violet states that sites for Channel 262C2 or 295C2 differ from the presently authorized site for Channel 257A at Kingman but should not be a hardship since the Class A facility has not been constructed.

4. After consideration of the information filed in this proceeding, we will allot Class C2 channels to both communities. We find it is in the public interest to allot FM Channel 256C2 to El Dorado, Kansas, in accordance with Section 1.420(g) of the Commission's Rules. We shall also modify the license of Station KBUZ(FM) to specify the new channel. As stated in the *Notice*, Channel 256C2 can be allotted to El Dorado, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules.[4]

5. A staff analysis confirms that FM Channel 262C2 can be allotted to Kingman, Kansas. We believe the public interest would be served by the allotment of FM Channel 262C2 to Kingman. Thus, in accordance with Section 1.420(g) of the Rules, we shall modify the construction permit of Bliss Communications to specify operation on Channel 262C2 in lieu of Channel 257A. Channel 262C2 can be allotted to Kingman with a site restriction 7.8 kilometers southwest of the community.[5] The site restriction will avoid a conflict with a Channel 262C construction permit for Station KDVV, Topeka, Kansas. It should be noted that Channel 295C2 could also be allotted to Kingman with a site restriction. However, lacking a showing of interest for an additional channel at Kingman, the channel will not be allotted at this time.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
El Dorado, Kansas	256C2
Kingman, Kansas	262C2

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KBUZ(FM), El Dorado, Kansas, IS MODIFIED to specify operation on Channel 256C2, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the permit of Bliss Communications for Channel 257A, Kingman, Kansas, IS MODIFIED to specify operation on Channel 262C2, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] On December 4, 1987, the Commission authorized the assignment of this license (formerly Station KSPG-FM, El Dorado, Kansas) to Gary Violet. At the request of Gary Violet, the call letters of Station KSPG-FM were changed to KBUZ(FM), effective January 11, 1988.

[3] Public Notice was given on April 7, 1988, Report No. 1722 (RM-6323).

[4] The coordinates for Channel 256C2 at El Dorado are 37-48-47 and 96-48-44.

[5] The coordinates for Channel 262C2 at Kingman are 37-36-15 and 98-11-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-472

In the Matter of

Amendment of Section 73.202(b), RM-5936
Table of Allotments,
FM Broadcast Stations.
(Cedar Key, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of BayMedia, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6695 (1987), proposing the allotment of Channel 274A to Cedar Key, Florida, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received. Channel 274A can be allotted to Cedar Key in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by allotting Channel 274A to Cedar Key, Florida, since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cedar Key, Florida	274A

3. The window period for filing applications will open on **October 18, 1988,** and close on **November 17, 1988.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 29-08-12 and West Longitude 83-02-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-42

In the Matter of

Amendment of Section 73.606(b), RM-6139
Table of Allotments,
Television Broadcast Stations.
(Coos Bay, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 2, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of KMTR, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 888 (1988), proposing the allocation of Channel 23 to Coos Bay, Oregon, as the community's first local television allotment. Petitioner filed comments reiterating its intention to apply for a construction permit to build a facility on Channel 23 and operate the station as a satellite of its Station KMTR-TV in Eugene, Oregon. No other comments were received.

2. As stated in the *Notice*, Coos Bay is located within the minimum co-channel separation distance (169 miles actual vs. 175 miles required) of Portland, Oregon, which is one of the areas affected by the Commission's freeze on the acceptance of construction permit applications for vacant channels. *See Order*, 52 FR 28346, July 29, 1987. The *Notice* recognized that Channel 23 can be allotted to Coos Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. In addition, it went on to state that the allotment might not be affected by the freeze on applications for new stations in the Portland area if the petitioner expressed an intention to specify a site at least 13.3 kilometers (8.3 miles) south of Coos Bay. In its comments, petitioner states that it has conducted a preliminary survey of the area and has determined that sites are available which would comply with the Commission's site restriction and that it is willing to specify such a site in its application for a construction permit.

3. We believe the public interest would be served by allotting Channel 23 to Coos Bay, Oregon, since it could provide the community with its first local television service. Channel 23 can be allotted to Coos Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. However, any application which is filed for this channel which does not specify at least a 175 mile separation to Portland, Oregon, may not be accepted for filing if the Commission's freeze on such applications is still in effect.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 17, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Coos Bay, Oregon	23+

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-15-09 and West Longitude 124-15-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-66

In the Matter of

Amendment of Section 73.202(b),	RM-6143
Table of Allotments,	RM-6183
FM Broadcast Stations.	
(Malone and Owls Head, New York)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1007 (1988), requesting comments on two mutually exclusive petitions for rule making seeking first local FM allotments. Specifically, North County Broadcast Co., Inc. (North Country) requests the allotment of Chanel 243A to Malone, New York, and Timothy D. Martz (Martz) requests the allotment of Channel 242A to Owls Head, New York. Comments were filed by North County and Martz and reply comments were filed by North Country. Both parties reiterated their intention to apply for their requested allotment.

2. In the *Notice*, Martz was requested to furnish data to support a finding that Owls Head is a community for allotment purposes since it is not listed in the U.S. Census. In response, he states that Owls Head, with a population of 350 persons, is the largest community in Belmont Township. He also states that Owls Head has a U.S. Post Office with its own zip code, two churches (St. Joseph's Catholic and Owls Head Methodist), a volunteer fire department, and one commercial establishment (Woods Country Store).

3. Martz goes on to state that Owls Head should be preferred over Malone because the allotment of Channel 242A would provide the community with its first local aural service while Malone already receives service from AM Station WICY, Malone. However, Martz believes that a comparison of the two communities is not necessary because either Channel 234A or Channel 267A could be allotted to Malone in compliance with the minimum distance separation requirements to all domestic stations and in conformance with the terms of the U.S.-Canada Working Agreement.

4. North Country disputes Martz' contention that Owls Head is a community for allotment purposes. It argues that the existence of a post office, one commercial establishment, two churches and a volunteer fire department does not demonstrate community status, citing *Oak Beach and Bay Shore, New York*, 57 R.R. 2d 1275 (1985), and *Vimville, Mississippi*, 55 R.R. 2d 256 (1983). North County submits that Martz has not shown that Owls Head has the traditional indicia of a community such as its own government officials, city hall, local newspaper, police, schools, municipal services, civic groups or a bank. In addition, North Country notes that Owls Head is not incorporated or listed in the 1986 Rand-McNally Road Atlas, and does not appear to have readily identifiable boundaries, thus making compliance with Section 73.315 of the Commission's Rules impossible, citing *Naples, North Naples and Immokalee, Florida*, 41 R.R. 2d 1549 (1977).[1]

5. Before we can reach a decision on the comparative merits of a Channel 242A allotment to Owls Head, we must first determine that Owls Head is a community for allotment purposes. As stated in *Yorktown, Virginia*, 38 FR 6695, March 12, 1973, the principal test, where a place is neither listed in the U.S. Census nor incorporated, is "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce." Therefore, Martz was requested to provide information as to the social, economic and cultural organizations in Owls Head sufficient to warrant a determination that it is a community for allotment purposes. To this end, Martz states that Owls Head has a post office, two churches, a volunteer fire department and one business. However, it appears that the residents of Owls Head do not receive any municipal services, such as police, water, library, or schools from a local Owls Head government. Except for the one local business, there is no local newspaper, no community-related organization, such as a Lions or Rotary Club, Chamber of Commerce or community center. Based on this information, we find that there is insufficient indicia to warrant a determination that Owls Head is a community for allotment purposes. *See Vimville, Mississippi, supra*.

6. Having determined that Owls Head is not eligible for an FM allotment, there is no reason to consider the allotment of a channel to Malone different from the one requested by North Country. North Country has reiterated its interest in use of the channel at Malone. Channel 243A can be allotted to Malone, without a site restriction, in compliance with the Commission's minimum distance separation requirements to all domestic allotments.[2] This allotment is approximately 6 kilometers short-spaced to Station CKOI-FM, Channel 245C1. Verdun, Quebec, and approximately 24 kilometers short-spaced to unused and unapplied for Channel 243C1 at Trois Riveres, Quebec, Canada. In this regard, Canadian concurrence has been received for the allotment at Malone as a specially negotiated short-spaced allotment.

7. We believe the public interest would be served by allotting Channel 243A to Malone since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Malone, New York	243A

8. The window period for filing applications will open on **October 18, 1988,** and close on **November 17, 1988.**

9. IT IS FURTHER ORDERED, That the request of Timothy D. Martz for the allotment of Channel 242A to Owls Head, New York (RM-6183), IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] North Country also opposes the allotment of Channel 234A or Channel 267A to Malone, as suggested by Martz, contending that they are not as technically desirable as the requested Channel 243A.

[2] The coordinates for this allotment are North Latitude 44-51-00 and West Longitude 74-17-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-419

In the Matter of

Amendment of Section 73.202(b),	RM-6358
Table of Allotments,	
FM Broadcast Stations.	
(Amarillo, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of John A. Gay, Jr. (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 289A to Amarillo, Texas, as that community's eighth local FM service. Petitioner states his intention to apply for the channel, if allotted. Channel 289A can be allotted to Amarillo in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Amarillo, Texas, could receive its eighth local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Amarillo, Texas	226C1, 231C, 245C, 250C, 254C1, 270C, 276A	226C1, 231C, 245C, 250C, 254C1, 270C, 276A, 289A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robyn G. Nietert, Esquire
David J. Kaufman, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used are 35-12-30 and 101-51-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-418

In the Matter of

Amendment of Section 73.202(b), RM-6402
Table of Allotments,
FM Broadcast Stations.
(Hawley, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 2, 1988; Released: August 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Jerry C. Paparelli (petitioner) requesting the allotment of Channel 287A to Hawley, Pennsylvania, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 287A can be allotted to Hawley in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.0 kilometers (2.5 miles) north to avoid a short-spacing to the pending application of Station WDAS-FM, Channel 287B1, Philadelphia, Pennsylvania, specifying Class B facilities (ARN-870129IE).[1] Canadian concurrence in the allotment is required since Hawley is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 287A to Hawley, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hawley, Pennsylvania	---	287A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerry C. Paparelli
401 Virginia Avenue
Peckville, Pennsylvania 18452
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-30-32 and West Longitude 75-10-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-413

In the Matter of

Amendment of Section 73.202(b), RM-6370
Table of Allotments,
FM Broadcast Stations.
(Ringgold, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by James E. Price (petitioner), requesting the allotment of Channel 229A to Ringgold, Georgia, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 229A can be allotted to Ringgold in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.3 kilometers (3.9 miles) west to avoid a short-spacing to Station WLJA-FM, Channel 228A, Ellijay, Georgia.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 229A to Ringgold, Georgia, since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ringgold, Georgia	270A	229A, 270A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James E. Price
Route 6, 14 West Sharon Circle
Ringgold, Georgia 30736
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-54-01 and West Longitude 85-10-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-414

In the Matter of

Amendment of Section 73.202(b), RM-6231
Table of Allotments,
FM Broadcast Stations.
(Helen, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Helen Broadcasters (petitioner), requesting the allotment of Channel 286A to Helen, Georgia, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 286A can be allotted to Helen in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.5 kilometers (1 mile) east to avoid a short-spacing to the construction permit of Station WQSB, Channel 286C, Albertville, Alabama (BPH-850712JJ).[1]

2. We believe the public interest would be served by proposing the allocation of Channel 286A to Helen, Georgia, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Helen, Georgia	–	286A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard Hildreth, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, Suite 400
Washington, D.C. 20036

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-42-00 and West Longitude 83-42-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-415

In the Matter of

Amendment of Section 73.202(b), RM-6401
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by KOFI, Inc. (petitoner), requesting the substitution of FM Channel 280C1 for Channel 280A at Kalispell, Montana. Petitioner also requests the modification of its construction permit (BPH 870527MD) for Station KOFI, Channel 280A, to specify Channel 280C1.

2. We believe petitioner's proposal warrants consideration. Channel 280C1 can be allotted to Kalispell, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules at the authorized site for Channel 280A.[1] Since Kalispell is within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government is required for this allotment. We shall also propose to modify the construction permit of Station KOFI, Channel 280A, to specify operation on Channel 280C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide an additional wide coverage area station for the Kalispell, Montana area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Kalispell, Montana	246C, 253C, 280A	246C, 253C, 280C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis F. Begley
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 280C1 at Kalispell are 48-11-52 and 114-15-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-416

In the Matter of

Amendment of Section 73.202(b), RM-6426
Table of Allotments,
FM Broadcast Stations.
(Pearson, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Albert E. Harper d/b/a Harper Broadcasting (petitioner), requesting the allotment of Channel 270A to Pearson, Georgia.[1] Petitioner states that it will apply for the channel, if allotted. Channel 270A can be allotted to Pearson in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) west to avoid a short-spacing to Station WZAT, Channel 271C, Savannah, Georgia.[2]

2. We believe the public interest would be served by proposing the allotment of Channel 270A to Pearson, Georgia, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pearson, Georgia	--	270A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy F. Perkins, Jr., Esq.
1400-20th Street, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Petitioner originally sought the allotment of Channel 253A to Pearson as a counterproposal to the allotment of Channel 253A to Ocilla, Georgia (MM Docket 86-270). Petitioner's counterproposal was not accepted since it was untimely filed. However, we have substituted Channel 270A for consideration herein.

[2] The coordinates for this allotment are North Latitude 31-17-38 and West Longitude 82-52-51. The required spacing is met based on a grant of the pending application (BLH-880210KF) of Station WGBA, Channel 273C1, Waycross, Georgia, for a license to cover its outstanding construction permit.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-417

In the Matter of

Amendment of Section 73.202(b),	RM-6295
Table of Allotments,	
FM Broadcast Stations.	
(Idalia, Colorado)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making submitted by Virginia K. Cutforth, requesting the allotment of FM Channel 231A to Idalia, Colorado, as a first local broadcast service. Petitioner states that she intends to apply for the channel, if allotted.

2. In support of the proposal, petitioner states that Idalia is a farming community, as well as the center of community activity with schools, and a community fire, water and sewage district.

3. A staff engineering analysis indicates that Channel 231A can be allotted to Idalia in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

4. In view of the foregoing, we believe it is appropriate to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Idalia, Colorado, as follows:

	Channel No.	
City	Present	Proposed
Idalia, Colorado	--	231A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Virginia K. Cutforth
965 South Irving Street
Denver, CO 80219

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] This determination is based on the use of city reference coordinates at 39-42-06 and 102-17-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-412

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ramsey and Shelbyville, Illinois)	RM-6369

NOTICE OF PROPOSED RULE MAKING

Adopted: August 2, 1988; Released: September 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Kin Do Communications, Inc. (petitioner), licensee of Station WSHY-FM (Channel 285A), Shelbyville, Illinois, proposing to substitute Channel 286B1 for Channel 285A and to modify its Class A license to specify the new channel. In order to accomplish the upgrade, petitioner has requested that Channel 227A be substituted for unused Channel 287A at Ramsey, Illinois.[1] Petitioner proposes to utilize its present Class A transmitter site for Channel 286B1.[2]

2. In accordance with our established policy, we shall propose to substitute Channel 286B1 for Channel 285A at Shelbyville and modify the license for Station WSHY-FM, accordingly. Pursuant to Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 286B1. The applicant for Channel 287A at Ramsey will be permitted to amend his application to specify Channel 227A, if allotted, and retain cut-off protection, since no upgrade in the class of channel is proposed.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Ramsey, Illinois	287A	227A
Shelbyville, Illinois	285A	286B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gene A. Bechtel
Ann C. Farhat
Bechtel & Cole, Chartered
2101 L Street, N.W.
Suite 502
Washington, D.C. 20037

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND A COPY of this *Notice of Proposed Rule Making* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED to the following applicant for Channel 287A at Ramsey, Illinois:

Mr. Henry J. Voss
S. Fayette Street
RR2
Ramsey, Illinois 62008

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Presently, one application is pending for Channel 287A at Ramsey, Illinois (BPH851028ME), filed by Henry J. Voss.

[2] Coordinates for the proposed substitutions at Ramsey are 39-08-06 and 89-06-02, and at Shelbyville, 39-24-05 and 88-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: September 1, 1988

CLARIFICATION OF FM CHANNEL ALLOTMENT AT LA PLATA, MARYLAND

On September 29, 1987, we released the *Public Notice, Allotments Pursuant to BC Docket No. 80 - 90*, 2 FCC Rcd. 6180 (1987). That *Public Notice* announced the release of a revised Table of Allotments (Section 73.202 of the Rules) reflecting the March 2, 1987, reclassification of Class B and Class C FM stations pursuant to BC Docket No. 80-90.

Other changes were also included in the revised Table of Allotments. Included among these changes was having the allotment listed in the Table reflect the actual community of license. Previously, the repealed portion of Section 73.203 of the Rules permitted a Class B or Class C allotment to be licensed to any unlisted community within 15 miles of the community listed in the Table and a Class A allotment to be licensed to any unlisted community within 10 miles. In these situations involving the former "10/15 mile" Rule, the original community of allotment had previously been retained in the Table, despite the fact that the station operating on that allotment was licensed to a different community.

Station WXTR, Channel 281B, La Plata, Maryland was affected by this action. Although licensed to La Plata, station WXTR operated on an allotment originally made to Waldorf, Maryland. At the time of our action revising the Table to list La Plata, there was a pending application by Station WXTR to change its community of license from La Plata to Waldorf (File No. BPH-850712QQ). This application was permitted under Section 73.3573(a)(1) of the Rules because Waldorf as a community of license was in accord with the Table. Inasmuch as the application was pending at the time of our earlier action revising the Table, we are taking this opportunity to further revise the Table to list Waldorf for the Channel 281B allotment in order to permit grant of the application.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WGMS) Bethesda, Maryland	**MM DOCKET NO. 84-1148** File No. BR-1403

For Renewal of License

POTOMAC BROADCASTING CORPORATION *et al.*	**MM DOCKET NOS. 84-1149 to 1151, 84-1159**

For Construction Permit for a new AM Station

RKO GENERAL, INC. (WGMS-FM) Washington, D.C.	**MM DOCKET NO. 84-1162** File No. BRH-789

For Renewal of License

POTOMAC BROADCASTING CORPORATION *et al.*	**MM DOCKET NOS. 84-1163, 84-1166 to 1167, 84-1170 to 1173, 84-1178**

For Construction Permit for a new FM Station

SOUTH JERSEY RADIO, INC. Assignor	
and	File Nos. BAL-880104HV, BALH-880104HN
CLASSICAL ACQUISITION PARTNERSHIP Assignee	

For Consent to Assignment of Licenses for WGMS and WGMS-FM

and Related Applications	File Nos. BLH-880104KE, BLH-880104KF

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1988; Released: September 2, 1988

By the Commission: Commissioner Dennis dissenting and issuing a statement.

1. Before the Commission are: (1) a Petition for Approval of Settlement Agreement and Related Relief filed January 4, 1988 by RKO General, Inc. (RKO), Potomac Broadcasting Corporation (Potomac), South Jersey Radio, Inc. (South Jersey), COZZIN Communications Corporation (COZZIN), Vernell Broadcasting, Inc. (Vernell), Quality Broadcasters of Washington, D.C., Inc. (Quality), National Capital Radio Corporation (NCRC), Ming Broadcasting, Ltd. (Ming), Riggs Radiocasters Ltd. (Riggs), and Classical Acquisition Partnership (Classical); (2) an opposition filed January 14, 1988 by the Mass Media Bureau; and (3) a Reply filed January 27, 1988 by Petitioners.

2. In their petition, the parties propose to settle this comparative renewal proceeding. The main features of the settlement are: (1) RKO's renewal applications for WGMS and WGMS-FM would be dismissed; (2) the mutually exclusive applications of Potomac, COZZIN, Vernell, Quality, NCRC, Ming, and Riggs would be dismissed; (3) South Jersey's mutually exclusive applications for WGMS and WGMS-FM would be granted; (4) South Jersey would assign the licenses for WGMS and WGMS-FM to Classical; (5) Classical would acquire the physical and other assets of WGMS and WGMS-FM by acquiring GRADH-104, Inc., a subsidiary of RKO; and (6) Classical would pay RKO $33,885,000 of which a total of $10,360,000 would be used to pay the other applicants, leaving RKO with a net payment of $23,525,000.[1] (The parties clarified the nature of the remuneration provisions in a letter from J. Roger Wollenberg (counsel for RKO) to Diane S. Killory, General Counsel, FCC on July 21, 1988.)

3. The parties contend that their settlement would serve the public interest by avoiding further burdensome litigation in this case and by helping to resolve the protracted and complex set of interrelated proceedings involving 14 RKO-owned stations, including WGMS and WGMS-FM. RKO's basic and comparative qualifications have been at issue in this series of proceedings for 23 years.[2] The parties also contend that approval of the agreement will put WGMS/WGMS-FM into the hands of an unarguably qualified licensee which would not suffer the same uncertainties as to its future as RKO does. The parties have submitted affidavits stating that they filed their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement.

4. Additionally, the parties request a temporary waiver of the Commission's rules in connection with the settlement. They note that the 1 mV/m contour of WGMS overlaps that of WCEM, Cambridge, Maryland. Thus, co-ownership of the two stations would violate the Commission's duopoly rule, 47 C.F.R. § 73.3555(a)(1). Waiver of the rule is necessary here because principals of VerStandig Broadcasting Limited, one of the general partners of Classical, has an attributable interest in M. Belmont VerStandig, Inc., the licensee of WCEM. The parties note that the Commission has undertaken a Rule Making, in which the Commission has proposed to revise the rule in a manner that would permit co-ownership of WGMS and WCEM. *Amendment of Section 73. 3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 2 FCC Rcd 1138,

1141 ¶ 26 (1987). The parties request that Classical's principals should not be required to divest their interest in WCEM until six months after the conclusion of the Rule Making or 12 months after the consummation of the settlement, whichever is later.

5. The Bureau opposes approval of the settlement, contending that it violates several Commission rules and policies, because it involves the assignment of a license immediately upon grant. The Bureau argues that the agreement is in essence a sale of the stations by RKO and may not be approved until RKO is found qualified to be a Commission licensee. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). Additionally, the Bureau argues that the agreement violates Commission rules and policies prohibiting trafficking in licenses and construction permits. *See Scott & Davis Enterprises, Inc.*, 54 RR 2d 868 (1983); 47 C.F.R. §§ 73.3597(a)(1), (c)(2). The Bureau also argues that the parties have not justified a temporary waiver of the duopoly rule, which, the Bureau points out, remains in force until such time as it is modified.

6. We have fully considered the principal objections raised by the Bureau in approving a settlement agreement similar to the instant one in the KHJ-TV, Los Angeles, California proceeding (Docket Nos. 16679-80). *RKO General, Inc. (KHJ - TV)*, FCC 88-253 (adopted Jul. 20, 1988). We there concluded that strong public interest considerations favor settling what has become one of the most protracted and burdensome proceedings in the Commission's history. Although the circumstances in this case are not identical to those in the Los Angeles proceeding, we believe that essentially the same public interest considerations govern both proceedings. That is, we continue to believe that the public interest is better served in this case by ending this uniquely protracted litigation -- which threatens to continue for many years to come -- so that RKO can withdraw as a licensee and an unquestionably qualified licensee, able to devote its full resources to broadcasting, can take over the ownership of the station and operate it without a cloud of uncertainty hanging over its head. We also noted that approving the settlement would preserve our policy of deterring licensee misconduct. RKO would not receive full compensation for the license. Under the terms of the settlement agreement, RKO would receive only 69 percent of the proceeds of the sale. [3] Further, RKO has already suffered the loss of WNAC-TV in Boston, now worth more than $400 million. In addition, RKO must either withdraw entirely from broadcasting or risk the loss of its remaining stations if the Commission finds it unqualified in Phase I of the KHJ-TV proceeding. Consistent with our disposition of the KHJ-TV agreement, therefore, and for the reasons stated more fully there and which we incorporate herein, we hold that approving the agreement before us would serve the public interest. Similarly, we find that the agreement complies with 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525. We note, moreover, that in a pleading filed July 7, 1988, the Bureau states that it has reviewed the assignment application and finds that the proposed assignee is qualified.

7. Turning to the duopoly question, we do not find it appropriate to grant the full relief that the parties have requested. The Commission does not routinely waive rules merely because they might be modified in the future as the result of a pending rulemaking. Indeed, the Commission recently refused to grant a similar request for a waiver of our duopoly rule pending the outcome of the pending rulemaking, explaining that to do so might improperly prejudge the outcome of the rulemaking. *Lauren A. Colby*, FCC 88-224 (Jul. 8, 1988). The instant situation, like that in *Colby*, is distinguishable from the circumstances in *Capital Cities / ABC, Inc.*, 2 FCC Rcd 2539 (1987). There, we did grant a waiver pending the duopoly rulemaking, but the effect of such relief was to postpone the divestiture of interests that were already commonly owned as the result of grandfathered combinations, not to permit the creation of a new prohibited interest in anticipation of the rulemaking. Thus, we will not, as the parties requested, postpone the requirement that the assignee divest the interest prohibited by the rule until six months after the conclusion of the rulemaking proceeding.

8. On the other hand, we believe there is a sufficient public interest to permit some temporary relief. As we have already explained, there are strong public interest reasons to approve the parties' proposed settlement agreement. We believe it would serve the public interest to facilitate the consummation of the agreement by providing the parties with a transition period for the assignee to bring itself into compliance with the duopoly rule. The 12 months proposed by the parties does not appear unreasonable, and the temporary common ownership of WGMS and WCEM should not produce any detriment to the public. The overlap area is in the vicinity of Washington, D.C., and Baltimore and Annapolis, Maryland. Together there are approximately 30 AM stations licensed to these localities and an even greater number of FM stations. Accordingly, we find it in the public interest to give petitioners 12 months from the consummation of the agreement for Classical's principals to divest themselves of the overlapping station.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Approval of Settlement Agreement and Related Relief filed January 4, 1988 IS GRANTED and that the associated Agreements ARE APPROVED.[4]

10. IT IS FURTHER ORDERED, That the following applications for renewal of license and for construction permits ARE DISMISSED with prejudice: RKO General, Inc. (File Nos. BR-1403, BRH-789), Potomac Broadcasting Corporation (File Nos. BP-830510AK, BPH-830510AM), COZZIN Communications Corporation (File Nos. BP-830512AC, BPH-830512BT), Vernell Broadcasting, Inc. (File Nos. BP-830512BU, BPH-830512AK), Quality Broadcasters of Washington, D.C., Inc. (File No. BPH-830512BJ), National Capital Radio Corporation (File No. BPH-830512BO), Ming Broadcasting, Ltd. (File No. BPH-830512BV), and Riggs Radiocasters Ltd., a Limited Partnership (File No. BPH-830512CL); that the applications of South Jersey Radio, Inc. (File Nos. BP-830511AD, BPH-830512AI, BLH-880104KE, 880104KF) ARE GRANTED; and that the applications for the assignment of WGMS and WGMS-FM (File Nos. BAL-880104HV, BALH-880104HN) ARE GRANTED.

11. IT IS FURTHER ORDERED, That the principals of Classical Acquisition Partnership SHALL COME INTO COMPLIANCE with 47 C.F.R. § 73.3555(a)(1), with respect to the common ownership of WGMS, Bethesda, Maryland and WCEM, Cambridge, Maryland, no later than 12 months after the consummation of the instant settlement.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED and the Partial Initial Decision dealing with the qualifications of the various applicants for a construction permit (*RKO General, Inc. (WGMS)*, 2 FCC Rcd 3757 (I.D. 1987)) IS VACATED as moot.[5]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] The payments to the other applicants would be distributed as follows:

Potomac	$3,775,000
South Jersey	$ 540,000
COZZIN	$ 350,000
Vernell	$ 765,000
Ming	$1,200,000
NCRC	$ 865,000
Quality	$ 815,000
Riggs	$2,050,000

[2] A detailed history of these proceedings is set forth in *RKO General, Inc. (KHJ - TV)*, FCC 88-253 (adopted Jul. 20, 1988).

[3] As in *KHJ - TV*, it is significant to our approval of the agreement that RKO is receiving significantly less than the 75 percent of fair market value that a licensee might receive for transfer of its license pursuant to a distress sale.

[4] As the parties have requested, the parties may consummate the mutually contingent transactions at a single closing. Our action shall be effective with respect to the termination of the parties' hearing rights upon their notifying us of closing under those transactions.

[5] The parties request this relief, and it is customary practice. *See United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975).

DISSENTING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

IN Re: Petition for Approval of Settlement Agreement and Related Relief in the Bethesda, Maryland/Washington, D.C. radio Comparative Renewal Proceeding (MM Docket No. 84-1148).

I respectfully dissent from the Commission's action for the reasons stated in my dissent in the *Memorandum Opinion and Order* in Docket No. 16679, RKO General, Inc. (KHJ-TV), Los Angeles, California.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88- 411

Amendment of Sections of Part 22
of the Commission's Rules in the
Matter of Airborne Use of
Cellular Units and the Use of
Cell Enhancers in the Domestic
Public Cellular Radio Service

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1988; Released: September 2, 1988

By the Commission:

1. We hereby propose to amend the rules in the Domestic Public Cellular Radio Service to prohibit the use of cellular units in aircraft and to adopt rules that would allow for the use of cell enhancers.

CELLULAR UNITS IN AIRCRAFT

2. The Commission has received numerous inquiries requesting authority to use cellular units in airplanes, helicopters, balloons, and other airborne vehicles. In addition, the Federal Aviation Administration (FAA) has contacted the Commission on several occasions requesting an interpretation of the Commission's rules concerning the use of cellular units in aircraft.

3. On October 11, 1984 the Commission issued a Public Notice (Mimeo No. 0200) interpreting the rules concerning airborne use of cellular units.[1] That notice contained the following language:

> There are no cellular frequencies available for air-ground service, and persons owning, installing, or operating airborne cellular units will be subject to enforcement action.

4. We have concluded that the Public Notice of October 11, 1984, which is in effect at the current time, does not adequately address all questions concerning the use of cellular units in aircraft. Therefore, this Rule Making is being initiated in order to clearly and concisely state the rules concerning the prohibition of airborne use of cellular units. Pending the conclusion of this Rule Making proceeding we will continue to follow the guidelines set forth in the October 11, 1984 Public Notice. Thus, installation or operation of cellular units in aircraft will continue to be prohibited during the pendency of this proceeding.

5. The key technical feature of the cellular radio service is frequency reuse. In this context the term frequency reuse refers to the practice of using the same frequency several times within a market. If a cellular unit is used in an aircraft it will have a much greater transmitting range than a land-based unit. The increase in transmitting range could result in serious interference to transmissions at other cell locations within the system, where the frequency assigned to the airborne cellular unit is being reused. Furthermore, since a cellular mobile unit is capable of operation on all of the assignable cellular frequencies, serious interference may be caused to cellular systems in adjacent markets as well. For this reason we are proposing to adopt a rule which codifies our present policy and prohibits the installation or operation of mobile stations or portable units in aircraft.

CELL ENHANCERS

6. Many licensees in the Domestic Public Cellular Radio Service, as a result of unforeseen terrain shadowing, experience areas of poor or nonexistent cellular service within their Cellular Geographic Service Area (CGSA). Since the addition of one or more new cell sites may be too costly, possibly requiring the reconfiguration of existing cells and modification of frequency usage, licensees and manufacturers desire alternative technical solutions to the problem. One solution is the use of a cell "enhancer" or "booster," a device that receives, amplifies and retransmits the signals of a particular cell site and its associated mobiles, to and from areas of poor coverage.

7. In early 1985, the Commission received the first request for authorization to evaluate a cell enhancer under actual field conditions. Because existing cellular rules did not specifically provide for use of cell enhancers, and the device itself was not type-accepted, the Commission granted developmental authority to test the enhancer. The device proved successful in solving the problem of poor coverage, and subsequently, many more requests for developmental authority to test cell enhancers have been filed with the Commission. Because the use of these enhancers has become common, without any documented cases of interference between authorized systems, we believe that it would be in the public interest to adopt rules that would allow the use of cell enhancers on a regular basis.

8. While we are aware that there are different approaches to the design of cell enhancers, developmental authorizations granted to date have involved only one type of cell enhancer, and have contained limitations on the use of the enhancer. All the enhancers for which we have granted developmental authority use a wideband linear amplifier that simply amplifies signals without modifying their frequencies. The power of the authorized enhancers has been limited to a maximum output power equivalent to 0.25 watts per channel. If higher powered enhancers were authorized such devices could conceivably be used to provide service to new areas in lieu of an additional cell site. However, for the purpose of this notice, we will consider an enhancer only as a device to improve service within an existing coverage area.

9. In this notice we propose rules that would allow the routine licensing of cell enhancers. The rules we are proposing are based on the type of cell enhancers operated under the developmental authorizations granted during the last three years. Consequently by this notice, we seek comments only on the authorization of the type of cell enhancer, presently utilized under developmental authority, according to the conditions set forth below.

10. Authorization of cell enhancers would be subject to prior notification of their use, on FCC Form 489. Schedule B of FCC Form 401 should be attached for each enhancer utilized. A licensee could use an enhancer(s) at

any location(s) within its authorized CGSA. Any antennas used in conjunction with an enhancer, must be less than 100 feet above ground, without exceeding Section 17.7 of the Commission's rules or must be 20 feet or less above ground or the highest point of an existing man-made structure (other than an antenna tower.) If an antenna exceeds these limits, a licensee must notify the FAA of the proposed construction and obtain marking and lighting specifications from the Commission before installing the enhancer. Licensees would be required to notify all other cellular carriers operating within the same MSA, NECMA or RSA of the use of an enhancer. Notification would contain the location of the enhancer and its associated cell site, together with the frequencies to be amplified. Enhancers would be authorized on a secondary and non-interfering basis to other cellular systems operating within the same MSA, NECMA or RSA. In addition, use of cell enhancers would be subject to the frequency coordination procedures described in Section 22.902(d) of the Commission's Rules.

11. All cell enhancers would be type-accepted. In order to obtain FCC type-acceptance, we propose that cell enhancers must comply with the technical requirement that output power must not exceed 0.25 watts per channel.[2] Enhancers operating at this low power level are unlikely to cause significant frequency coordination or interference problems, and could therefore be authorized under the simple notification procedures proposed herein. Furthermore, as has been demonstrated through the various developmental authorizations, cell enhancers operating at 0.25 watts per channel output power, can successfully solve the problem of poor coverage areas within an existing cell contour. In addition, because the distance to the 39 dbu contour from such a low power device would be very limited, these devices can be used at or near the outer boundaries of a carrier's CGSA without the danger of extending a signal significantly into the adjacent market.

12. The cell enhancers, within the scope of this notice, operate as linear amplifiers, which merely receive, amplify and retransmit the signals of base and mobile stations without modification of frequency, emission or modulation characteristics. To avoid interference with the operation of adjacent block cellular systems, or systems operating outside the cellular bands, we propose that a cell enhancer must attenuate unwanted emissions below the mean power of the unmodulated carrier in accordance with the following schedule:

(a) From the band edge of the respective cellular frequency block, up to and including 20 kHz removed from the band edge: at least 26 decibels.

(b) Greater than 20 kHz from the band edge: 43 + 10 log (mean output power in watts) decibels.

(c) Testing for the above emission limits shall be performed in the following manner: three carrier frequencies shall be contained within the frequency block covered by the band enhancer. These signals shall be within that portion of the band where the gain of the cell enhancer is within 6 db of the maximum gain exhibited by the enhancer. The location of the carrier signals shall be adjusted such that at least one third order intermodulation product falls within the upper band edge and the upper band edge plus 20 kHz and between the lower band edge and the lower band edge minus 20 kHz. Two separate tests with different placement of carrier frequencies may be employed for this test.

13. We propose that cell enhancers be eligible for authorization through the type acceptance procedures specified in Subpart J of Part 2 of of the Commission's Rules. However, comments are solicited as to whether or not notification, rather than type acceptance procedures, would be appropriate.

14. *The National Environmental Policy Act of 1969*, 42 U.S.C. Sections 4331-4335 (implemented by Commission rules, 47 C.F.R. Sections 1.1301-1.1319). We propose that all applicants determine whether the proposed facility may have a significant environmental effect as set forth in 47 C.F.R. Section 1.1307. We propose that the applicant may not construct prior to receiving an authorization if the applicant determines that the facility may have a significant environmental effect. *See also Amendment of Environmental Rules (NPRM)*, Gen. Docket No. 88-387, FCC 88-265 (released 1988).

REGULATORY FLEXIBILITY ACT - INITIAL ANALYSIS

15. Reason for action and objectives. The proposed action clarifies the rules and prevents a potential interference source.

16. Legal Basis. The authority for this proposed rulemaking is contained in Sections 1, 4(i), 301 and 303 of the Communications Act of 1934, as amended.

17. Small entities affected and potential impact. We do not expect negative consequences on small entities as a result of our action.

18. Federal rules which overlay, duplicate, or conflict with this action. None.

19. Reporting, record-keeping and compliance requirements. None.

20. Specific alternatives that could accomplish the same objectives. None.

21. Comments on all aspects of the analysis and proposed rule of this Notice are encouraged. Interested persons are invited to submit comments in accordance with Section 1.419 of the Commission's Rules, 47 CFR Section 1.419. Comments must be filed by **October 24, 1988** and reply comments by **November 8, 1988.**

22. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, which ever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

24. A copy of this Notice of Proposed Rule Making shall be sent to the Chief, Counsel of Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

PROPOSED RULES

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; (47 U.S.C. 154,303).

2. Section 22.2 is proposed to be amended by adding the following definition:

22.2 Definitions:

* * * * *

Cell enhancer - A fixed station in the Domestic Public Cellular Radio Telecommunications Service, used to improve signal strength in areas of poor service, which receives, amplifies, and re-transmits the signals of a cellular base or mobile station, without modification of frequency, emission or modulation characteristics.

* * * * *

3. Section 22.904 is proposed to be amended by adding paragraph (d) to read as follows:

22.904 Power limitations

* * *

(d) Cell enhancers utilized in this service shall not exceed a maximum power output equivalent to 0.25 watts per channel.

4. Section 22.907 is proposed to be amended by adding paragraph (k) to read as follows:

22.907 Emission requirements

* * *

(k) Cell enhancers used in this service must attenuate unwanted emissions below the mean power of the unmodulated carrier in accordance with the following schedule:

(1) From the band edge of the respective cellular frequency block, up to and including 20 kHz removed from the band edge: at least 26 decibels.

(2) Greater than 20 kHz from the band edge: 43 + 10 log (mean output power in watts) decibels.

(3) Testing for the above emission limits shall be performed in the following manner: three carrier frequencies shall be contained within the frequency block covered by the band enhancer. These signals shall be within that portion of the band where the gain of the cell enhancer is within 6 db of the maximum gain exhibited by the enhancer. The location of the carrier signals shall be adjusted such that at least one third order intermodulation product falls within the upper band edge and the upper band edge plus 20 kHz and between the lower band edge and the lower band edge minus 20 kHz. Two separate tests with different placement of the carrier frequencies may be employed for this test.

5. Section 22.911 is proposed to be amended by adding paragraph (a)(1) to read as follows:

22.911 Permissible Communications

(a) * * *

(1) Mobile stations or portable units may not be installed or operated in aircraft, balloons or any other vehicle capable of airborne operation.

6. Section 22.922 is proposed to be added to read as follows:

22.922 Cell Enhancers - Licensees in this service may use a cell enhancer at any location within its authorized CGSA. Authorization of cell enhancers is subject to prior notification on FCC Form 489. A schedule B of FCC Form 401 should be attached for each enhancer utilized. Any

antennas used in conjunction with an enhancer, must be less than 100 feet above ground, without exceeding Section 17.7 of the Commission's rules or must be 20 feet or less above ground or the highest point of an existing man-made structure (other than an antenna tower.) If an antenna exceeds these limits, a licensee must notify the FAA of the proposed construction and obtain marking and lighting specifications from the Commission before installing the enhancer. Licensees are required to notify all other cellular carriers operating within the same MSA, NECMA or RSA of the use of an enhancer. Notification should contain the location of the enhancer and its associated cell site, together with the frequencies to be amplified. Enhancers are authorized on a secondary and non-interfering basis to other cellular systems operating within the same MSA, NECMA or RSA. In addition, use of cell enhancers are subject to the frequency coordination procedures described in Section 22.902(d) of the rules.

FOOTNOTES

[1] Section 22.509(b)(2) of the Commission's Rules specifically limits the operation of airborne mobile stations governed by Part 22 of the Commission's Rules to the frequencies listed in Section 22.521 of the rules. Section 22.521 specifies the operating parameters of the Air-Ground Radiotelephone Service, which utilizes certain frequencies in the 454 MHz band. Section 22.509(b)(2), which existed prior to the creation of Subpart K of the Public Mobile Service Rules governing cellular radio, was inadvertently left out of the cellular rules.

[2] At time of installation, the gain of the enhancer would be adjusted relative to the number of channels being amplified, in order to limit the maximum power output to 0.25 watts per channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTELLICALL OPERATOR SERVICES, INC.

File No. I-T-C-88-158

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 24, 1988; Released: September 2, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on June 21, 1988, by Intellicall Operator Services, Inc. (IOS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on July 6, 1988. No comments were received.

2. IOS is already providing domestic resale service. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by IOS.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-158 IS GRANTED, and IOS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, between the United States and those points are now or may hereafter be listed in that tariff.

5. Copies of any operating agreements entered into between IOS and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that IOS shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-395

In re Applications of

RANDALL R. WAHLBERG (hereafter Wahlberg)	File No. BPH-870629MT
STEPHEN D. TARKENTON (hereafter Tarkenton)	File No. BPH-870630MT
SPRINGFIELD FM LIMITED PARTNERSHIP	File No. BPH-870701MU
CHARLES A. MCCLURE (hereafter McClure)	File No. BPH-870701MY

For Construction Permit
for a New FM Station at
Springfield, Florida
Channel 270A (101.9 MHz)

HEARING DESIGNATION ORDER

Adopted: July 20, 1988 **Released: September 6, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Wahlberg.* Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and Wahlberg have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Wahlberg would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Wahlberg petitioned for leave to amend his application on April 29, 1988. The accompanying engineering amendment was filed after September 24, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. *Tarkenton.* In response to Section II, Item 9(a), Tarkenton indicates that he is in violation of the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. Accordingly, an issue will be specified.

5. *McClure.* In his Exhibit I, McClure specified his transmitting antenna as located on the north tower of the 3-tower directional array of WGNE(AM) (then WDLP). McClure specified the overall height of the north tower as 92 meters above ground and 102 meters above mean sea level. Commission records indicate the north tower (including lighting) to be 93 meters (305 feet) AGL and 102 meters (335 feet) AMSL. Because McClure clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, drawing on the application as a whole, confidently verify the actual tower height above ground level (including lighting) and above mean sea level by taking official notice of the site coordinates and tower heights as found in the Commission's files for the licensed colocated facility. Accordingly, McClure was found to be acceptable for filing; however, he shall be required to file a corrective amendment to his application with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. McClure has not completed Item 4 correctly, giving a post office box number as his residence address in Columbus, Georgia. Accordingly, McClure must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Wahlberg would constitute a hazard to air navigation.

2. To determine whether Tarkenton is owned or controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Wahlberg IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That McClure shall file the appropriate amendment concerning its tower height (and any related items), as described in paragraph 4 hereinabove, with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That McClure shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-399

In re Applications of

Jon A. & Connie C. Hill d/b/a J & C BROADCASTING COMPANY (hereafter: J&C)	File No. BPH-870925MB
TIDEWATER BROADCASTING (hereafter: Tidewater)	File No. BPH-870928MA
Robert H. Cauthen, Jr. and Joseph A. Booth d/b/a JH COMMUNICATIONS (hereafter: JHC)	File No. BPH-870928MB
AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter: Indian)	File No. BPH-870928MC
RADIO FRANKLIN LIMITED PARTNERSHIP (hereafter: RFLP)	File No. BPH-870928MD

For a Construction Permit
for a New FM Station
on Channel 299A
in Windsor, Virginia

HEARING DESIGNATION ORDER

Adopted: August 1, 1988; Released: September 6, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* A "Petition to Deny or Dismiss" RFLP's application was filed by JHC on May 16, 1988. RFLP filed a "Motion for Extension of Time" on June 9, 1988 and an "Opposition to Petition to Deny" on June 17, 1988. JHC filed a "Reply to Opposition to Petition to Deny" on June 23, 1988. JHC charges that when RFLP submitted its application for Windsor on September 27, 1987 (BPH-870928MD), it already had pending an application to build a new FM station at Franklin, Virginia (BPH-870630NI). Since the predicted 1 mV/m contours of the Franklin and Windsor facilities overlap in violation of 47 C.F.R. § 73.3555(a)(2), JHC contends that at the time the Windsor application was filed, it was inconsistent with the pending Franklin application pursuant to 47 C.F.R. § 73.3518.[1]

3. The inconsistent application rule is designed to "prevent the abuse of our processes by the filing of two or more applications which are inconsistent with each other either on their face or in the context of any of our rules" and, therefore, cannot be granted. *WSTV, Inc.*, 17 FCC 530, 531 (1953); *see also Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987). This rule also serves "to expedite [the Commission's] application processing procedures by avoiding the disruption of having two inconsistent applications contemporaneously being studied by the staff," when only one application can be granted. *KKAP Broadcasting Co.*, 63 FCC 2d 235, 236 (1976). When inconsistent applications are filed, the Commission has determined that the appropriate remedy is dismissal of the latest filed application. *See Big Wyoming, supra; see also LNJ Communications*, 2 FCC Rcd 6072, 6074 (1987). There is, however, one exception to this rule:

> Inconsistent applications will not . . . be dismissed when, at the time of filing, the applicant makes the unequivocal statement that its earlier filed application is being or will be dismissed in the near future. *See Harold J. Haley d/b/a Madison County Broadcasting Co.*, 2 FCC Rcd 40 (1987)[, *aff'd* 836 F.2d 653 (1988)]. A statement which indicates that dismissal of the earlier filed application is contingent upon the occurrence of some other action or event will not be sufficient. The statement must be unequivocal and applicants will be bound by the representations made therein.
>
> *WGSM Radio, Inc.*, 2 FCC Rcd 4565, 4569, n. 13 (1987); *see also Roy Davis*, 3 FCC Rcd 2017, n.1 (1988).

4. *Harold J. Haley d / b / a Madison County Broadcasting Co., supra*, involved an application filed by Madisonville Media Company (Madisonville) for an AM station at Madisonville, Texas, on 880 kHz which Madisonville already had on file when it filed its application for an AM station for the same city on 1220 kHz in competition with an application filed by Harold J. Haley d/b/a Madison County Broadcasting Co. (Haley). In its 1220 kHz application, filed October 29, 1982, Haley stated unequivocally that it would dismiss its 880 kHz application "soon," pursant to a settlement agreement it intended to file with the Commission in the near future. The settlement agreement was filed on December 14, 1982, six weeks after Madisonville pledged in its 1220 kHz application to dismiss its 880 kHz application. The settlement was approved, and Madisonville's 880 kHz application dismissed shortly thereafter. Haley contended, *inter alia*, that regardless of the dismissal of Madisonville's 880 kHz application, Madisonville's 1220 kHz application should nonetheless be dismissed for violating § 73.3518 of the Commission's Rules prohibiting the filing of inconsistent applications because the 880 kHz application was on file when the later filed 1220 kHz application was submitted. The Commission concluded, however, that dismissal of Madisonville's application was not warranted because Madisonville had unequivocally informed the Commission when it filed its 1220 kHz application that it would dismiss its 880 kHz application and had carried out that pledge shortly thereafter and, thus, the intent of the Commisson's rules pro-

hibiting inconsistent applications, *see* para. 2, *supra*, was not subverted by the filing of Madisonville's 1220 kHz application.[2]

5. Similarly, in the instant case, RFLP pledged in its later filed Windsor application to dismiss its earlier filed Franklin application pursuant to a settlement agreement. Further, in this case, the settlement agreement had already been on file with the Commission since September 22, 1987, six days prior to the filing of RFLP's Windsor application. The settlement was approved and RFLP's Franklin application dismissed, on January 22, 1988. Given that RFLP stated unequivocally in its Windsor application that it intended to dismiss the Franklin application and carried out that pledge well before the applications for the Windsor allocation were designated for comparative hearing, we find that the intent of § 73.3518 in prohibiting inconsistent applications was not subverted by the filing of RFLP's Windsor application and that, therefore, § 73.3518 does not warrant dismissal of RFLP's Windsor application. Accordingly, JHC's "Petition to Deny or Dismiss" RFLP's Windsor application is denied.

6. *EEO*. In response to Section VI, FCC Form 301, J&C has indicated that it will employ five or more fulltime employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by J&C is deficient in that it fails to identify at least one female-oriented recruitment source for Windsor.[3] Accordingly, J&C will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *Late - Filed Amendments*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Tidewater	June 21, 1988
JHC	January 22, 1988; May 26, 1988
Indian	April 28, 1988 July 11, 1988

8. *Late - Filed Amendment / Returned*. On January 7, 1988, RFLP filed an amendment to replace engineering exhibit 14 of its application. Pursuant to 47 C.F.R. § 73.3522(a), all amendments filed outside the specified periods for amendments as of right and prior to designation for hearing must be accompanied by a showing of good cause, or filed pursuant to 47 C.F.R. §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the Commission's staff without consideration. RFLP's January 7, 1988 amendment was submitted after the applicable window for amendments as of right and is therefore untimely. RFLP's amendment was not accompanied by a showing of good cause, and cannot be considered under §§ 1.65 or 73.3574. Accordingly, RFLP's amendment will be returned.

9. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That JHC's "Petition to Deny or Dismiss" RFLP's application IS DENIED.

13. IT IS FURTHER ORDERED, That J&C shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein. *APPLICANTS:* Tidewater, JHC, Indian

15. IT IS FURTHER ORDERED, That RFLP's January 7, 1988 amendment IS HEREBY RETURNED.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Section 73.3518 provides that "[w]hile an application is pending and undecided, no subsequent conflicting or inconsistent application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee."

[2] The Commission's action took the form of an Order which denied Haley's Application for Review of the Mass Media Bureau's decision that, *inter alia*, application of § 73.3518 was not warranted. *Order*, FCC 84-630, released December 18, 1984. The *Order* was affirmed without opinion in *Harold J. Haley v. FCC*, 836 F.2d 653 (1988).

[3] One organization J&C lists as a recruitment source, Isle of Wight Extension Service, is unfamiliar to the staff. In the event that this organization satisfies the female or any other EEO recruitment requirement, J&C may amend its EEO program to describe the organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1

Annual 1988 Access Tariff Filings

Petitions for Reconsideration
of December 24, 1987 Order

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1988; Released: September 2, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 24, 1987, we released an order relating to the Annual 1988 Access Filings,[1] which initiated an investigation, suspended some rate changes pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and tentatively disallowed a portion of certain rates pursuant to Section 204(b) of the Act. Cincinnati Bell Telephone Company (CBT) and Contel Corporation (Contel) have filed petitions for reconsideration of portions of the *December 24 Order* tentatively disallowing portions of the rates filed by those carriers.[2] CBT requests removal of the depreciation expense disallowance, while Contel disputes certain rate adjustments for Tier 2A companies and adjustments for cash working capital. American Telephone and Telegraph Company (AT&T) opposed Contel's petition and Contel replied. We received no responses to CBT's petition.

II. PETITIONS

A. *Cincinnati Bell Petition*

2. The *December 24 Order*, tentatively disallowed certain depreciation expenses claimed by CBT, and adjusted CBT's interstate revenue requirement to reflect the disallowance. [3] CBT argues that its 1988 access filing appropriately included expenses reflecting accelerated amortization for inside wire (Part 32, Account 2321) because the Commission had previously approved such accelerated amortization. CBT Petition at 1-2. CBT contends that it received permission on June 29, 1987, to amortize the net unrecovered balances in the Station Connection, Inside Wire account over a 24-month period beginning July 1, 1987, for jurisdictions in which it secures approval from the state regulatory agency. *Id.* at 2. CBT submits correspondence with the Ohio Public Utilities Commission and the Kentucky Public Service Commission approving accelerated amortization. *Id.*, Attachments.

B. *Contel Petition*

3. The *December 24 Order* directed Contel to reduce its 1988 traffic sensitive switched access rates for 12 Tier 2A companies. *December 24 Order*, 3 FCC Rcd at 1316.[4] Contel argues that this Bureau erred in rejecting Contel's econometric demand forecast models which are based on data specific to Contel's service areas, and that we inappropriately defaulted to AT&T's demand analysis. Contel Petition at 3-6. Contel asserts that use of carrier common line minutes as a proxy for historical traffic sensitive minutes understates Contel's demand and results in inflated growth rates. *Id.* at 6-7. It further claims that Contel's demand growth patterns are distorted by the time period this Bureau used for our analysis. *Id.* at 8. Contel argues that our use of a nation-wide growth rate ignores the unique characteristics of the various exchange carriers. *Id.* at 8-11. Contel also believes that rate adjustment factors should not have been applied to switched access nonrecurring charges. *Id.* at 11-12. Finally, Contel asserts that the cash working capital disallowance was greater than necessary because the *December 24 Order* relied on data that were not based on Contel's specific information, and that we erroneously applied the cash working capital disallowance only to the Contel Tier 1 companies. *Id.* at 13-15.

4. AT&T opposes Contel's petition for reconsideration, arguing that this Bureau did not rely on AT&T's data but instead analyzed data submitted by AT&T and the LECs. AT&T Opposition at 2-3. AT&T submits that if Contel had adequately explained the disparity between its historical and projected demand growth, this Bureau would not have adjusted Contel's traffic sensitive rates. *Id.* at 3. AT&T claims that Contel's calculations confirm the conclusion that Contel's projected demand growth appears understated. *Id.* at 4-5. AT&T observes that this Bureau accepted Contel's data regarding historical growth rates. *Id.* at 6. Finally, AT&T contends that our 8 - 9 percent growth rate for 1988 demand is conservative. *Id.* at Attachment 1.

5. Contel replies that it finds no reference in the *December 24 Order* to indicate that this Bureau considered company-specific economic and demographic data to arrive at the projected nation-wide growth rates. Contel Reply at 4. Contel disputes AT&T's contention that further data are necessary to evaluate Contel's econometric model, and claims that its Description and Justification submitted with its annual filing comprehensively describes its model. *Id.* at 5. Contel asserts that average, industry growth rates and national elasticity estimates cannot be accurately applied to Contel's small, rural service areas. *Id.* at 7-9. Finally, it reiterates that this Bureau did not consider distortions, such as Bell Operating Company recording of WATS demand, when we determined demand growth patterns. *Id.* at 10-12; *see* Contel Petition at 6-7.

III. DISCUSSION

6. After reviewing the petitions for reconsideration and associated pleadings, we conclude that the petitions should be dismissed. The *December 24 Order*, stated:

> We wish to emphasize that neither these partial rate allowances nor the [rate adjustment factors] used to implement them are rate prescriptions. They represent, rather, partial authorizations of rates to the

extent necessary to correct questionable or erroneous aspects of the rate development process as set out in the LEC filings. The LECs are free to propose revisions to the resultant rates at any time. Of course, such filings must be accompanied by relevant cost support information and we would expect the proposal to address fully the considerations which led us to conclude that the proposed rates are erroneous or questionable. *December 24 Order* at 1315.

7. Rather than file such cost supported revisions, CBT and Contel chose to file petitions for reconsideration. Reconsideration is not appropriate in view of the nature of a tentative disallowance pursuant to Section 204(b). We therefore dismiss those petitions for reconsideration and invite these carriers to file tariff revisions, if they so choose, that accomplish the goals of their petitions. Such revisions must fully comply with the referenced language from the *December 24 Order*, above.[5]

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petitions filed by Cincinnati Bell Telephone Company and Contel Corporation, requesting reconsideration of the *December 24 Order* regarding Annual 1988 Access Tariff Filings, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, *Memorandum Opinion and Order*, 3 FCC Rcd 1281 (1988) (*December 24 Order*).

[2] Cincinnati Bell Telephone Company Petition for Reconsideration, filed Dec. 29, 1987 (CBT Petition); Contel Petition for Reconsideration, filed Feb. 22, 1988 (Contel Petition).

[3] *December 24 Order*, 3 FCC Rcd at 1316; *see also* Appendices F and G, *id.* at 1423-24.

[4] A list of Contel Tier 1 and Tier 2 jurisdictions is included in the Appendix to this Order. All Contel Tier 2 jurisdictions are classified as Tier 2A. The Appendix also contains a list of the Contel Tier 2A jurisdictions that were subject to rate adjustment by the *December 24 Order*.

[5] We note that interstate rate of return (ROR) reports for the first quarter of 1988 are available for exchange carriers' tariffed jurisdictions. *See* LEC Submissions of FCC Form 492, June 30, 1988. The first quarter ROR reports represent the first publicly available information concerning the performance of exchange carriers under the 1988 access tariffs.

The Appendix to this Order summarizes Contel's RORs for the switched traffic sensitive category. In summary, Contel's Tier 1 jurisdictions achieved a 14.51 percent ROR in the aggregate and Contel's Tier 2A jurisdictions achieved a 13.60 percent ROR in the aggregate. The subset of Contel Tier 2A jurisdictions that were subject to rate adjustment by the Bureau in the *December 24 Order* for projections of traffic sensitive minutes of use achieved a 12.43 percent ROR. In other words, in the aggregate, all three sets of jurisdictions exceeded the authorized ROR (12.00 percent) and the ceiling on the authorized ROR (12.40 percent) for the first quarter of 1988. The subset of Contel Tier 2A jurisdictions which were subject to rate adjustments by the Bureau exceeded the authorized ROR and the ceiling on the authorized ROR by the least amount.

CBT achieved a 17.44 percent ROR for the first quarter of 1988 for the switched traffic sensitive category and a 10.39 percent ROR for the special access category. If Contel chooses to file revised rates, these results should be taken into account in providing a *de novo* justification for any revised rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules Governing
the Amateur Radio Services.

ORDER

Adopted: August 22, 1988; Released: September 2, 1988

By the Chief, Private Radio Bureau:

1. On April 13, 1988, the Commission released a *Notice of Proposed Rule Making* (*Notice*) in this proceeding, 3 FCC Rcd 2076 (1988), proposing to reorganize Part 97 of the Code of Federal Regulations, 47 C.F.R. Part 97. This rule part governs the Amateur Radio Services.[1] Comments were due on or before August 31, 1988. Reply comments were due on or before October 31, 1988.

2. On July 25, 1988, the American Radio Relay League, Inc., (ARRL) filed a motion to extend the time for filing comments in this proceeding to and including November 29, 1988. In support of this request the ARRL stated that its ad hoc committee to review the proposal in this matter requires, at a minimum, an additional 90 days to complete its work.

3. As the ARRL pointed out in its motion to extend the comment period, this is not a single issue proceeding. It involves a complete restructuring of the entire body of the amateur service rules. As such it merits detailed review and discussion by the amateur community to develop its recommendations and views regarding the proposed changes in this major proceeding.

4. It is in the public interest, convenience and necessity to ensure that the rules proposed by the Commission to serve as the new foundation for the amateur service receive sufficient scrutiny to produce thoughtful comment and a complete record. The ARRL's basis for this request is meritorious.

5. In view of the foregoing, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r), and under the authority delegated by Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331, that the Motion for Extension of Time filed by the ARRL IS GRANTED.

6. Interested parties may file comments in response to the *Notice* in this proceeding on or before November 29, 1988. Reply comments may be filed on or before January 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTE

[1] These services consist of the amateur service, the amateur-satellite service and the radio amateur civil emergency service (RACES). Of the three, the amateur service and the amateur-satellite service are recognized internationally. RACES exists only in the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION — ENF 84-2

Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1988; Released: August 19, 1988

By the Chief, Common Carrier Bureau:

1. The Bell Operating Companies (BOCs) have filed seven pleadings[1] seeking additional time to comply with two filing requirements which the Commission established in the *NATA / Centrex Reconsideration Order*.[2] In that Order, the Commission affirmed its earlier conclusion that Customer Dialed Account Recording (CDAR) is an enhanced service which the BOCs may offer only on a detariffed basis. [3] The Commission allowed the BOCs to continue to provide CDAR on a nonseparated basis, subject to two conditions. First, the BOCs must amend their cost allocation manuals within 30 days (*i.e.*, by August 22, 1988) to reflect their provision of CDAR as a nonregulated activity. Second, the BOCs must detariff CDAR no later than October 1, 1988.[4]

2. The BOCs request that the date for filing amendments to their cost allocation manuals be extended to September 30, 1988. They base their request on two general grounds. First, the BOCs argue that 30 days is inadequate for them to develop cost allocation methodologies to reflect the joint use of network plant by CDAR and basic services.[5] Second, the BOCs point out that they already are obligated to file any additional amendments to their cost allocation manuals on September 30, 1988.[6] In their view, combining the filing dates would minimize the flow of paperwork to the Commission and reduce the administrative burdens on both the Commission and the carriers.[7]

3. Some of the BOCs also ask that we extend the deadline for detariffing CDAR so that the pricing principles will be in place at the time of detariffing.[8] They argue that they must determine to what extent the costs allocated to CDAR impact on other services, and must forecast shared use of the network.[9] One BOC asserts a need for time to review the new CDAR allocation procedures before they are implemented.[10]

4. We will grant the BOCs' requests to extend the date for filing cost manual amendments to September 30, 1988. It will be less burdensome to all concerned if all manual amendments required during this quarter are filed at the same time. Moreover, we note that the public is afforded an opportunity under our procedures to file comments on certain types of cost manual amendments. The BOCs' amendments in response to the *NATA / Centrex Reconsideration Order* apparently will be of this nature. It is not a wise use of resources to establish one pleading cycle in late August when the public may again be invited to comment on similar filings in September.

5. We do not believe that the BOCs seeking additional time to detariff CDAR have shown adequate grounds therefor. More than three years have passed since the Commission determined in the *NATA / Centrex Order* that CDAR is an enhanced service. The Commission allowed the BOCs more than two months after its affirmation of this issue for the detariffing process to take place. The BOCs have had ample time to study the cost relationship of CDAR to other services and to determine how best to offer that feature as an enhanced service. Moreover, the fact that the specific cost manual procedures allocating costs to CDAR may not be approved prior to detariffing is not determinative or unique. Although we have conditionally approved all of the BOCs' manuals, we have not given final approval to all of their allocation procedures. Resolution of those issues may also affect the costs allocated to the BOCs' nonregulated activities. Further deferral of the detariffing of a feature that the Commission has twice found to be enhanced simply is not necessary or appropriate in this case.

6. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the motions identified in note 1, *supra*, ARE GRANTED to the extent that they seek an extension of the deadline for filing cost manual amendments to September 30, 1988, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The BOCs' pleadings are: Motion for Extension of Time to File a CDAR Cost Accounting Manual Amendment, filed by the Ameritech Operating Companies on August 9, 1988; Motion to Defer Filing and Detariffing Dates, filed by the Bell Atlantic Telephone Companies on August 10, 1988; Motion for Extension of Time, filed by Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. (U S West) on August 12, 1988 and amended on August 15, 1988; Motion to Defer Cost Allocation Manual Amendment and Detariffing Dates, filed by the NYNEX Telephone Companies on August 15, 1988; Motion for Extension of Time, filed by BellSouth Corp. on August 15, 1988; Motion to Defer Filing and Detariffing Dates, filed by Pacific Bell and Nevada Bell on August 15, 1988; Motion for Extension of Time, filed by Southwestern Bell Telephone Co. on August 15, 1988. The United States Telephone Association filed Comments in support of Ameritech's and Bell Atlantic's motions on August 12, 1988. Cincinnati Bell Telephone Co. filed a motion on August 12, 1988, also seeking a deferral of the filing requirements.

[2] North American Telecommunications Ass'n, Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, FCC 88-221 (released July 21, 1988) (*NATA / Centrex Reconsideration Order*).

[3] *See* North American Telecommunications Ass'n, 101 FCC 2d 349 (1985) (*NATA / Centrex Order*).

[4] *NATA / Centrex Reconsideration Order*, paras. 49-50.

[5] Ameritech states, for example, that it must develop an appropriate cost causative usage factor, establish the proper number of cost pools and determine an accurate method to track actual usage. Ameritech Motion at 2-3.

[6] In the orders conditionally approving the BOCs' cost allocation manuals, we required them to update the manuals on a quarterly basis. *See, e.g.*, NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 81, 93 (1988).

[7] *See, e.g.*, BellSouth Motion at 4.

[8] Not all BOCs requested such an extension, and the requests vary. *See, e.g.*, US West Motion at 1 (60 days after the cost manual amendments are filed); Ameritech Motion at 2 (detariffing after approval of the amendments); Southwestern Bell Motion at 4 (detariffing on January 1, 1989).

[9] *See, e.g.*, Bell Atlantic Motion at 2.

[10] Southwestern Bell Motion at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 401

ORDER

Adopted: August 23, 1988; Released: September 6, 1988

By the Chief, Common Carrier Bureau:

1. The GTE Telephone Operating Companies (GTOCs) propose to reduce, by approximately 4.7 percent, their switched access rate elements for the territory served by GTE California.[1] MCI Telecommunications Corporation (MCI) filed a petition to investigate to which the GTOCs replied.[2] The reductions are scheduled to become effective August 25, 1988.

2. The GTOCs contend that they are facing interstate "revenue erosion" from facility and service bypass in California, and that reducing rates will reduce this competitive threat and minimize future revenue erosion. Description and Justification (D&J) at 1. They state that the rate reductions would apply to the premium and nonpremium switched rate elements of End Office Switching, Switched Transport Termination, Switched Transport Facilities, Feature Group A 1+ Extension, and the Network Blocking Charge. D&J at 2. The rate reductions would not affect the information surcharge or the nonrecurring charges. The GTOCs assert that, to achieve lower rates for these switched access elements, they used the demand data from their annual 1988 access tariff filing, but reduced the current switched access revenue requirement by 4.7 percent (*i. e.*, $8,616,372). *Id.*

3. MCI supports the proposed rate reductions but has a concern regarding the procedures followed. It argues that the GTOCs must file a waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, because they have not targeted all switched access rates to earn the prescribed 12 percent rate of return. MCI Petition at 2. MCI contends that a formal waiver petition would provide the Commission with a procedure for insuring that the GTOCs' charges would not create unreasonable price discrimination. *Id.* It notes that, in *Authorized Rate of Return*, the Commission expressed a willingness to grant a Part 69 waiver to allow a carrier to target some but not all of its rate elements at less than the prescribed rate of return. [3] MCI also complains that the GTOCs have not supported their assertion that they are reducing rates to avoid bypass. MCI Petition at 1.

4. The GTOCs reply that they are not proposing any change in the targeted rate of return that would necessitate a waiver of the Commission's rules. GTOC Reply at 3. They state that they have instituted cost reduction programs in California but that these programs may not yield measurable results for 1988. The GTOCs assert that they do not intend to create any form of price discrimination and that the cost support materials are sufficient to allay fears of discrimination. They argue that while *Authorized Rate of Return* appears to call for equalization of rate of return by rate element, Part 69 does not prescribe an equal rate of return by rate element. *Id.* at 3-4.

5. The Common Carrier Bureau has reviewed Tranmsittal No. 401 and the parties' pleadings, and has concluded that an investigation is not warranted at this time. We note, however, that MCI is correct in asserting that the GTOCs should have filed a formal waiver petition in this instance. The authorized rate of return for the GTOCs is 12 percent; they currently earn 9.51 percent and the instant proposal would reduce their return to 4.81 percent. Thus the GTOCs propose to target their switched access rate elements at less than the authorized rate of return, and consequently, should have filed a request for waiver of the Part 69 requirement regarding targeting of each rate element to the authorized return.

6. In order to expedite this rate reduction, however, we grant the GTOCs, on our own motion, a Part 69 waiver that allows them to implement their proposal. Such a waiver is justified in this case because it will produce an immediate benefit to the public interest in the form of lower rates. We recognize that, when a carrier proposes to reduce less than all of its switched access rate elements below the authorized rate of return, its waiver request must contain a showing that such pricing is designed to respond to a *bona fide* competitive threat.[4] The GTOCs, however, are not subject to this requirement for the instant transmittal since they propose a reduction of all switched access rate elements. Moreover, there is no indication that the instant rate reduction is otherwise improper. Accordingly, we conclude that a waiver is justified. However, we advise the GTOCs, and all other carriers, that any future request to reduce any or all rate elements below the authorized rate of return must be accompanied by a formal request for waiver of the Part 69 requirement to target each rate element at the interstate authorized rate of return.[5]

7. Accordingly, IT IS ORDERED that the petition filed by MCI Telecommunications Corporation against the GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 401, IS DENIED.

8. IT IS FURTHER ORDERED that this Order shall take effect upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 401, filed May 27, 1988.

[2] MCI Petition To Investigate, filed June 13, 1988; GTOC Reply, filed June 23, 1988.

[3] *See* Authorized Rate of Return for the Interstate Services of AT&T and Exchange Telephone Carriers, Memorandum Opinion and Order, CC Docket No. 84-800, 59 Rad. Reg. 1592 (1986)

(*Authorized Rate of Return*) ; *rev' d on other grounds sub nom,* American Telephone and Telegraph Company v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

[4] *See* Authorized Rate of Return, 59 Rad. Reg. at 1608.

[5] Although no reductions are proposed by the GTOCs for nonrecurringcharges or information surcharges, those charges are not defined as rate elements under 69.4 of the Commission's Rules, 47 C.F.R. § 69.4, and are not subject to the Part 69 targeting requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AETNA LIFE INSURANCE COMPANY AND
AETNA CASUALTY AND SAFETY COMPANY,
Complainant,

v. File No. E-87-7

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: August 23, 1988; Released: September 6, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a Joint Motion filed on July 6, 1988, by Aetna Life Insurance Company (Aetna) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below, the Joint Motion is granted.

2. This proceeding was initiated by a formal complaint filed by Aetna against AT&T on December 5, 1986, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT & T*, DA-88-462 (released April 13, 1988). On May 13, 1988, Aetna filed an Application for Review of the Bureau's order. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. Aetna and AT&T represent that their agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. The parties state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint filed by Aetna Life Insurance Company and Aetna Casualty Surety Company and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the Settlement Agreement between Aetna Life Insurance Company and Aetna Casualty and Surety Company and American Telephone and Telegraph Company IS AUTHORIZED.

7. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibition on Common Ownership
of Cable Television Systems and
National Television Networks

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 4, 1988; Released: September 6, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

1. On August 27, 1982, we released the *Notice of Proposed Rule Making* (*Notice*) in this proceeding,[1] proposing to delete Section 76.501(a)(1) of the Commission's Rules, which prohibits the common ownership of cable television systems and national television networks (hereinafter referred to as the "network-cable cross-ownership rule).[2] In light of the developments in the video marketplace during the six years since the *Notice* was released, we are inviting further comments from all interested parties and the public, including those who may have previously filed comments in this proceeding, on our proposal to eliminate the network-cable cross-ownership rule.

2. *Background*. The Commission first adopted a restriction on network ownership of cable systems in 1970. [3] When it adopted the rule, the Commission expressed the general concern that "the networks already have a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience."[4] Other than general reference to concerns about programming diversity and network manipulation of the market and a cross-reference to the same standards applied in broadcast-cable cross-ownership adopted at the same time, the network ownership rule was not independently discussed.[5]

3. In the years following, however, doubts were expressed as to the rule's necessity or appropriateness. In 1980, the Commission's Network Inquiry Special Staff (Special Staff) released a report that concluded that network entry into cable television could increase competition, enhance efficiency, and improve the quality of cable service to advertisers and viewers.[6] The Special Staff stated that it is "difficult to see how this rule could serve any purpose but to restrain competition and diversity in the operation of cable systems."[7] In 1981, the Commission's Office of Plans and Policy (OPP) released a study which concluded that the original rationales for the rule could not be supported in the existing video marketplace.[8]

4. Based in part on these studies, the Commission issued the *Notice* initiating this proceeding, suggesting that the basis for the network-cable cross-ownership rule might no longer be valid, especially in light of the growth of the video marketplace in general and the development of cable television services in particular.[9] Therefore, the Commission concluded that the rule no longer serves the public interest and proposed its elimination. In addition, the *Notice* solicited comments on the appropriate framework the Commission should use to analyze media ownership issues, including questions of market definition and identification of levels of ownership concentration that would be considered excessive.[10] Thirty parties submitted comments or replies in response to the *Notice*.[11]

5. *Subsequent Developments*. In the six years since the *Notice* in this proceeding was issued, there appear to have been a number of developments concerning the cable industry and the national television networks which could have a bearing on this proceeding. Given this significant time span, we are issuing this *Further Notice* in order to allow interested parties and the public an opportunity to comment on any intervening events and circumstances that might bear on our evaluation of the network-cable cross-ownership rule.

6. The National Telecommunications and Information Administration (NTIA) recently issued a report on June 15, 1988, which concluded that broadcast television networks should no longer be prevented from owning cable systems.[12] This report, which recommended ways to "open up" local cable television markets to greater competition, urged elimination of the network-cable cross-ownership rule, in particular, on the grounds that national programming and advertising markets have become more competitive since the 1970 restriction was created.[13] Specifically, NTIA noted that the television networks' influence has diminished greatly during this period, which translates into a lessened ability to employ cross-ownership as an effective tool to reduce competition.[14] In fact, NTIA cited evidence of a growing concern that cable may now be the dominant video medium *vis a vis* broadcast television in many markets. In light of these developments, NTIA found that continuation of the ownership restrictions may be counterproductive to the public interest, limiting competition for control of local outlets and imposing costs on the public in terms of potential lost efficiencies that might be realized by vertical integration (*e.g.*, using programming units for both cable and broadcast operations).[15] We request comment on NTIA's recommendation to eliminate the prohibition on network-cable cross-ownership.

7. There have also been significant changes in the regulatory environment. For example, the 1984 Cable Act completely revised our cable regulations. In addition, the elimination of our must carry rules and reimposition of our syndicated exclusivity rules changed the competitive relationship between cable and broadcasting. In this regard, we solicit comment on whether network ownership of cable systems in markets where they have affiliated stations may influence the negotiation of affiliation contracts. Similarly, absent must carry, how does network affiliation with a local station and ownership of a cable system in the same market affect the competitive position of other broadcast facilities in that market.

8. *Conclusion*. In view of the above discussion, we seek comment regarding the effect that developments cited in the NTIA Report and any other interim developments may have on our initial proposal to eliminate the present

prohibition on national television network ownership of cable television systems within Section 76.501(a)(1) of the Commission's Rules.

PROCEDURAL MATTERS

9. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases a final order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

10. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any peron who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed comments, must provide, on the day of the oral presentation, a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

11. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document, which is the same as the IRFA prepared for the initial *Notice* in this proceeding. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Further Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

12. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

13. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **October 24, 1988,** and reply comments on or before **November 8, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (room 239) of the Federal Communications Commission, 1919 M Street, N.W. 20554.

14. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

15. Further information on this proceeding may be obtained by contacting Michele Farquhar, Legal Branch, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

REGULATORY FLEXIBILITY ACT

Initial Analysis

I. Reason for Action:

The proposed action will eliminate the existing prohibition on cross-ownership between cable television systems and national television networks. The Commission believes this prohibition is no longer necessary in terms of its original purposes and that possible cost benefits attributable to cross-ownership are being needlessly forgone by continuation of the rule.

II. Objective:

The objective of this action is to eliminate unnecessary regulation, thus permitting the marketplace to operate more freely and efficiently. In particular, networks may benefit by their ability to own cable systems, and cable systems may benefit through being owned by networks.

III. Legal Basis

The proposed Rule Making action is authorized by Sections 1, 2, 3, 4(i) and (j), 303, 307, 308, 309 and 403 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected:

The proposed action is not expected to have a significant impact on most small cable systems. However, to the extent that networks purchase existing small cable systems, the systems may benefit from the expertise of the network, or from the possible infusion of additional capital into the cable system. To the extent that networks choose to purchase large cable systems or that large cable systems choose to purchase networks, there should be little or no direct impact on small business entities.

V. Recording, Record Keeping and Other Compliance Requirements:

No recording, record keeping or reporting requirements for cable television operators are involved. The proposed action, however, will eliminate the need for possible Commission compliance actions or waiver proceedings related to the existing rule.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule:

None.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

None other than retaining the existing rule.

VIII. Conclusions:

The Commission desires to eliminate regulatory intervention in the marketplace to the maximum extent consistent with its responsibilities and policy objectives. Review of the network-cable cross-ownership prohibition indicates that this limitation is not necessary as a means of assuring program diversity in local or national video markets and that it may be precluding the realization of cost benefits which might result from network-cable cross-ownership. Accordingly, the Commission seeks comment from all interested parties regarding elimination of the existing prohibition on cross-ownership between national television networks and cable television systems.

FOOTNOTES

[1] *See Notice*, Docket 82-434, 91 FCC 2d 76 (1982).

[2] 47 CFR Section 76.501(a)(1); originally adopted as 47 CFR Section 74.1131. This rule provides that no cable television system (including all parties under common control) shall carry the signal of an television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in a national television network (such as ABC, CBS, or NBC). Of course, even if this rule is eliminated, section 76.501(a)(2) of our rules would still prohibit networks from owning cable systems whose service areas overlap with the Grade B contours of a commonly-ownedor controlled television station.

[3] *Second Report and Order* in Docket 18397, 23 FCC 2d 816 (1970), *recon. denied*, 39 FCC 2d 377 (1973).

[4] 23 FCC 2d at 821, para. 15.

[5] *Id.* at 819, para. 9. *See also Notice*, 91 FCC 2d at 77.

[6] *New Television Networks : Entry, Jurisdiction, Ownership and Regulation* (October 1980).

[7] *Id.* at 430.

[8] K. Gordon, J. Levy and R. Preece, *FCC Policy on Cable Ownership* (Staff Report, FCC Office of Plans and Policy), November 1981. Specifically, the OPP Study found that the possibility of anticompetitive or other adverse behavior by network owners of cable systems would be limited by strong consumer demand for cable services, the regulatory power of franchise authorities, and the availability of alternative transmission techniques. The study characterized network entry as a form of vertical integration which could produce substantial benefits such as economies of scale, access to capital, and increased research and development capacity. With respect to both economic and First Amendment considerations, the OPP Study concluded that the rule might have a negative net effect since it results in lost efficiencies but provides no countervailing benefit in terms of assuring program diversity. *See* the *Notice*, 91 FCC 2d at 79-81, for a more detailed discussion of this study and the comments received in response.

[9] *See Notice*, 91 FCC 2d at 81-82.

[10] Following the issuance of the *Notice*, OPP released a study on this subject. J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets* (Staff Report, FCC Office of Plans and Policy), December 23, 1982. This report proposed a general framework for analyzing the Commission's mass media ownership rules. The report was submitted into the record of this proceeding and interested parties were given the opportunity to file comments on the analysis.

[11] The principal proponents of repeal were the networks, other broadcasters, NAB, NCTA, Time Inc. and the Department of Justice. These parties generally reiterated the discussion in the Notice that the concerns on which the rule was based are no longer valid, as subsequent studies have shown. Parties opposing elimination, including several public interest groups, the New Jersey State Office of Cable Television, the United States Small Business Administration and twelve separately filed comments by the members of the Howard University Communications Law Seminar, generally believed that the Commission's analysis has been inadequate to justify repeal and that the proposed action represents an improper abandonment of the valid Commission policy of protecting the public interest.

[12] "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," NTIA Report No. 88-233 (June 1988)(hereinafter "NTIA Report").

[13] NTIA Report at 72-74.

[14] *Id.* at 72-73.

[15] *Id.* It should also be noted, however, that NTIA found that the prohibitions against the common ownership of a television broadcast station and cable system within the same market should not be removed because local broadcast stations may still have an incentive and opportunity to use ownership of a local cable system to disadvantage other broadcasters. *See* NTIA Report at 74-75.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations on Common Ownership of Cable Television Systems and National Networks

The debate over the cross-ownership rule comes down to a central issue: whether the effects of vertical integration between programming suppliers and outlets are, on

balance, good or bad. We have this debate on the common carrier information services front, too: whether we should separate content suppliers from operators of the information pipeline. In this cable arena, we have the added factor that cable operators are already integrating backwards into programming. The issue then becomes: should we continue to deny to networks the opportunity to own cable systems as well as program services, an opportunity players in the cable industry already enjoy? Or, is the public interest better served by separating programming ownership from the means of delivering it? Is that delivery through what might be characterized as a "bottleneck" or "essential facility" which could raise concerns about whoever own it -- whether networks or other vertically integrated owners such as many major cable MSOs? I look forward to comments on these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-14

In the Matter of

Amendment of Part 2	RM-4829
of the Commission's Rules	RM-4831
Regarding the Allocation of	RM-4983
the 216-225 MHz band.	

REPORT AND ORDER

Adopted: August 4, 1988; Released: September 6, 1988

By the Commission:

I. INTRODUCTION

1. By this action the Commission: 1) maintains the existing 216-220 MHz band allocation; 2) allocates the 220-222 MHz band on exclusive basis to the land mobile service for both government and nongovernment operations; and, 3) allocates the 222-225 MHz band on a exclusive basis to the amateur service. This proceeding addressed only the allocation of this spectrum. Subsequent proceedings will address the necessary service rules for the new land mobile allocation and modifications to the amateur rules.

2. In taking this action, the Commission has considered a variety of factors, including the need to provide for narrowband land mobile operations, actions of the 1979 World Administrative Radio Conference (1979 WARC), potential interference to TV broadcasting, the impact on the amateur use of the 220-225 MHz band and other factors. We have concluded that the above allocations are in the public interest. In making this determination we are particularly sensitive to the concerns expressed by amateurs in this proceeding. We continue to support the amateur service as vitally important to promote the development of individuals schooled in the radio art, to advance radio technology and to provide public service, particularly in times of emergencies. As a number of amateurs noted in their comments, use of this band by the amateur service has long been hampered by the cloud of possible reallocation as well as by the shared allocation of this band with the fixed and mobile services. We believe this has discouraged investment and use of the 220 MHz band by the amateur community. We are hopeful, however, that we have now removed that cloud and that amateur operations in this region of the spectrum will be encouraged by the primary exclusive allocation of the 222-225 MHz band to the amateur service.

BACKGROUND

3. Prior to the 1979 WARC, the 216-225 MHz band was allocated on a primary basis to the government radiolocation service. In the 216-220 MHz portion of the band, there were secondary allocations for the aeronautical mobile, fixed and land mobile services for telemetry operations. In the 220-225 MHz portion, there was a secondary allocation for the amateur service. During the preparation for the 1979 WARC, it was determined that the 216-225 MHz band was not sufficient to meet future United States radiolocation requirements.[1] Therefore, other bands were proposed to be allocated for radiolocation and this band was considered a candidate for reallocation for other purposes. At about the same time, a requirement for maritime mobile public correspondence was identified that could be accommodated in this band. Accordingly, the United States proposed at the 1979 WARC that the entire 216-225 MHz band be reallocated internationally to the maritime mobile service.

4. The U. S. proposal was not adopted by the 1979 WARC. Instead the 1979 WARC allocated the 216-220 MHz portion to the maritime mobile and fixed services and allocated the 220-225 MHz portion to the mobile, fixed and amateur services. The 1979 WARC also provided for phasing-out the radiolocation service.[2]

5. After the 1979 WARC, the Commission allocated the 216-220 MHz band to the maritime mobile service to accommodate Automated Maritime Telecommunications Systems (AMTS) in specific geographical regions of the country. [3] Secondary allocations in this band were retained for the aeronautical mobile, fixed and land mobile services for telemetry operations. However, it became necessary to readdress the allocation of the 220-225 MHz band since the maritime mobile allocation was not adopted for this portion of the band at the 1979 WARC. The Commission and the National Telecommunications and Information Administration (NTIA) agreed that a further domestic proceeding would be needed to determine the best use of this band. Therefore, the Commission allocated this band to the amateur, fixed and mobile services on a coequal primary basis for nongovernment services.[4] NTIA also allocated this band to the fixed and mobile services in the government table of frequency allocations. NTIA and the FCC agreed that amateur operations in this band would be allowed to continue but that the fixed and mobile services would not be initiated until an allocation plan for sharing the band by government and nongovernment users was developed. Later, an FCC/NTIA planning group recommended that a portion of the 216-225 MHz band be designated for narrowband land mobile operations on a shared basis between government and nongovernment users.[5]

Petitions for Rule Making

6. The Commission received three petitions for rule making requesting a reallocation of the 216-225 MHz band. They were submitted by Land Mobile Communications Council (LMCC), Sideband Technology, Inc. (STI) and LAOAD Radio and Microwave Communications Consultants (LAOAD).[6][7] Each petition requested that a portion of the 216-225 MHz band be allocated to the land mobile service for narrowband voice operations (5 kHz channels). The petitioners argued that an additional land mobile allocation is needed to help meet future private land mobile spectrum requirements. LAOAD further requested a primary allocation to the fixed service in the

216-220 MHz band for narrowband voice and telemetry operations (5 kHz and 2.5 kHz channels, respectively). LAOAD argued that there is a growing need for telemetry channels. Specifically, it argued that oil, gas and utility companies need these channels to monitor and control many remote stations from a single location.

Notice of Proposed Rule Making

7. On February 2, 1987, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in the instant proceeding.[8] The comment period to the *Notice* was extended by *Order* until May 21, 1987, and the reply comment period was also extended by *Order* until July 31, 1987.[9][10] In the *Notice* the Commission proposed to treat the 216-225 MHz band as follows: (1) maintain the primary maritime mobile allocations in the 216-220 MHz band; (2) maintain the secondary aeronautical mobile, fixed and land mobile allocations in the 216-220 MHz band for telemetry operations only; (3) reallocate the 220-222 MHz band on a primary basis to the land mobile service for both government and nongovernment operations and delete the existing primary allocations to the amateur, fixed and mobile services; and (4) allocate the 222-225 MHz band on a primary basis to the amateur service and delete the existing primary allocations to the fixed and mobile services. Further the Commission stated that the primary allocation to the radiolocation service for government operations in the 216-225 MHz band would be maintained until January 1, 1990. At that time it would become secondary except for one Navy radar system.[11] The Commission stated that any necessary operating rules resulting from this proceeding would be developed in a further proceeding.

8. In making these proposals, the Commission tried to balance several factors. The Commission felt the public interest would be served by providing dedicated spectrum for the development of narrowband spectrum efficient technologies. This was based on the belief that spectrum efficient technologies will be needed to meet the future spectrum requirements of the land mobile service and the present use of existing land mobile bands does not permit substantial penetration by narrowband technologies. In considering an allocation for narrowband land mobile service in the 220 MHz region, the Commission noted two constraints that appeared to preclude operation in the 216-220 MHz band. First, it appeared that land mobile operation in the 216-220 MHz band would be impractical due to the need to provide adequate protection to TV channel 13 broadcast operations located in adjacent spectrum at 210-216 MHz. Second, the Commission did not wish to restrain the development of Automated Maritime Telecommunications Systems being developed in the maritime mobile service in the 216-220 MHz band.

9. At the same time, the Commission was concerned about the impact of land mobile operation in the 220-225 MHz band on the amateur service. In the *Notice*, the Commission stated that it believed the overwhelming use of the 220-225 MHz band by the amateur service is for repeater operations. The Commission also stated that it felt the *Repeater Directory* (1985-86 edition) published by the American Radio Relay League (ARRL) provided an accurate representation of amateur repeater activity. Therefore, the Commission believed that it was appropriate to use the *Repeater Directory* to determine the loading of this band in comparison with other amateur bands. The Commission also noted that it was necessary to rely on the *Repeater Directory* because the Commission does not maintain an independent listing of amateur operations. The *Repeater Directory* indicated that most repeater operations were concentrated above 222 MHz. Further, because the number of repeaters was light in comparison with other amateur bands, it appeared that displaced amateur 220-222 MHz operations could be reaccommodated above 222 MHz.

10. Accordingly, the *Notice* tentatively concluded that an appropriate balance among these factors was to allocate the 220-222 MHz band for narrowband land mobile operations and to allocate the 222-225 MHz band exclusively to the amateur service. This would minimize the risk of interference to TV broadcasting, insure the future of AMTS and provide adequate spectrum for amateur operations.

11. In response to the *Notice*, the Commission received a large number of comments. The commenters generally fall into four distinct categories: land mobile interests; amateur interests; broadcast interests; and fixed service interests. Most of the comments were filed by amateur radio licensees. The Commission also received a large number of Congressional letters in this proceeding.[12] Most were in response to amateur inquiries.

DISCUSSION

General

12. There were comments both supporting and opposing the Commission's proposal. Land mobile interests support the proposal in general. They argue that dedicated spectrum is required if narrowband technologies for the land mobile service are to develop. Further they note that the propagation characteristics of this portion of the spectrum are ideal for land mobile communications and that additional spectrum will be needed to meet future land mobile communications requirements. Some land mobile interests even request that more than the 2 MHz of spectrum be allocated for land mobile use. The amateur community is opposed to the Commission's proposal. Amateur interests claim the 220-222 MHz band is needed now as well as in the future to support amateur operations other than fixed/mobile/repeater operations. Fixed service interests generally support the land mobile allocation but argue that an allocation should also be made to accommodate fixed operations such as multiple address. Broadcast interests are concerned about possible interference from land mobile operations to TV broadcast operations. The specific issues are discussed below.

Need for a Narrowband Allocation

13. Land mobile interests support the proposed allocations of the *Notice*. They state that to meet future land mobile communication requirements, spectrum efficient, narrowband technologies will be required. In this regard SEA, Inc. argues that narrowband technologies such as amplitude compandored single sideband (ACSB) provide a tangible promise for dramatically increasing use of all land mobile spectrum.

14. Specifically, land mobile interests argue that the 220-222 MHz band is needed for the development of narrowband operations. They argue there are not enough frequencies for narrowband operations in the existing 150 MHz and 450 MHz land mobile bands. They claim that

narrowband operations are growing on a limited scale in the 150 MHz land mobile band, but that the technical and other restrictions to protect existing land mobile stations from interference together with the unavailability of frequencies due to heavy existing use of this band have limited the growth and acceptance of narrowband systems.

15. Several land mobile interests claim the proposed allocation will help meet many of the current land mobile requirements. They note that with 5 kHz channeling, the proposed 2 MHz of spectrum will provide two hundred channel pairs for land mobile operations. Further, in support of the proposal, the Association of Public-Safety Communications Officers, Inc. (APCO) states that the 220 MHz portion of the spectrum is ideal for land mobile communications from the standpoint of spectrum characteristics and propagation. It notes that this band combines low noise, absence of skip, minimal foliage absorption and ease of effective antenna construction. The National Association of Business and Educational Radio, Inc. (NABER) argues that an uncongested land mobile allocation is needed to allow narrowband technologies to develop and flourish. Further, land mobile interests argue that there is considerable interest in using narrowband equipment in the 220 MHz band. Specifically, United Parcel Service of America, Inc. (UPS) claims that it will seek to develop a state-of-the-art delivery system using advanced technologies including narrowband equipment in the 220 MHz band if the Commission proposal is adopted.

16. On the other hand, many amateurs counter the land mobile arguments and believe that the proposals of the *Notice* should not be adopted. They argue that there is already adequate spectrum allocated to the land mobile service. Further, they claim that land mobile interests have not made a compelling case for new spectrum. They argue that the loading of existing land mobile spectrum needs to be reviewed before any reallocation of spectrum is made to the land mobile service. Further some amateurs argue that ACSB technology is inherently flawed. Still others argue that there is not a market for narrowband equipment due to its cost and performance. In either case they argue that spectrum should not be made available specifically for narrowband land mobile technologies.

17. We believe that spectrum efficient technologies will be essential in addressing this country's future land mobile requirements. Of course narrowband technology is not the only spectrum efficient technology that might be applied to land mobile needs. However, we note that it has the potential of greatly improving spectrum efficiency.[13] We are convinced that in order for narrowband land mobile technology to flourish, it must be afforded a reasonable opportunity to gain full acceptance in the market place. We do not believe this can be accomplished by the existing provisions for narrowband operations in the 150 MHz land mobile band. The steps needed to protect existing land mobile licensees in the 150 MHz band from interference from narrowband systems severely limit the extent to which such systems can be implemented. This is particularly the case in major urban areas where demand for land mobile services is greatest.

18. We reject the arguments that narrowband technology is inherently flawed. As with any new technology there are problems that must be worked out. We note in this regard that ACSB technology continues to advance and that new uses and equipment are being developed such as digital narrowband equipment. We also reject the argument that there is a lack of interest by land mobile users in narrowband technology. The comments to the *Notice* have shown considerable interest from the land mobile community in this relatively new technology. We also have concluded that the 220-222 MHz band will provide adequate spectrum as well as the necessary technical characteristics to allow narrowband technologies the opportunity to develop further.

19. We also believe that promoting narrowband technology for the land mobile service is consistent with the directive of the Communications Act ". . . to encourage the provision of new technologies and services to the public." and to ". . . generally encourage the larger and more effective use of radio in the public interest." The Act goes so far as to state "Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[14] There is clear and demonstrated interest in using this technology. Therefore, we believe a dedicated band of frequencies is needed to take full advantage of the technology. Accordingly, we find that an allocation of spectrum for narrowband operations in the land mobile service is in the public interest.

Alternative Spectrum for Narrowband Operations

20. Amateur interests advance a number of alternative spectrum options to accommodate narrowband technologies. Many amateurs argue that narrowband technologies should be developed in bands already allocated to the land mobile service. Specifically, ARRL claims that many land mobile stations have abandoned the VHF (30-50 MHz and 150-174 MHz) land mobile bands in favor of the UHF (450 and 800 MHz) land mobile bands. Therefore, ARRL argues that narrowband operations can be progressively carved into the VHF bands. Further, in *ex parte* presentations to the Commission's staff, ARRL presented a paper on use of the 30-50 MHz band for narrowband technology.[15] ARRL argues that the 30-50 MHz band is technically feasible for the development of narrowband technologies and that sufficient spectral space is available without disruption to existing users. Another alternative suggested by a number of amateurs is that some portion of the 216-220 MHz band be used for narrowband land mobile operations. In addition, LAOAD, in its comments, suggests that spectrum between 225 and 235 MHz, currently allocated to the government fixed and mobile services, be considered for narrowband land mobile. It states that this alternative would provide enough spectrum to meet all the requirements raised in this proceeding.

21. We have considered the possibility of implementing narrowband technologies in other bands. We note, in particular, that there are a number of technical problems associated with 30-50 MHz land mobile operation that would inhibit the development and growth of narrowband technology. First, "skip" interference greatly reduces frequency reuse. This substantially limits the number of land mobile systems that may share frequencies in this portion of the spectrum and greatly reduces any potential for geographical sharing. Second, the length of an antenna in this range of the spectrum would inhibit effective use of handheld radios.[16] And third, manmade "radio noise" particularly from vehicles, is troublesome at these frequencies. While it may be appropriate to allow narrowband technologies in this band at some time in the future, we believe there are too many obstacles to overcome in this band at this point in the development of this relatively

new technology. For the above reasons, we do not believe the 30-50 MHz band is a reasonable candidate for developing narrowband technologies.

22. We also believe that the current use and channelling plans of other land mobile bands, particularly in the 150 MHz band, provide little opportunity for narrowband technologies to fully develop. Further, we do not believe a reallotment of channels from within the existing land mobile bands for narrowband operation is in the public interest. reallotment would require thousands of existing licensees to be displaced. Further, a reallotment would entail severe costs to a large number of users, many of which are small businesses. It could also have a negative impact on safety services, such as the police and fire services.

23. We also considered the possibility of allowing mobile dispatch type operations in the 216-220 MHz band by removing the telemetry only restrictions. However, we believe that it would be premature to permit additional services in the 216-220 MHz band before AMTS systems in this band have a chance to develop as planned.[17] Further, we believe that the geographic limitations on land mobile operations in the 216-220 MHz band necessary to protect broadcast TV channel 13 operations would be so restrictive that this spectrum would provide little opportunity for land mobile operations in most major metropolitan areas.[18] Prior studies have shown that TV channel 13 receiver susceptibility to interference is between 30 and 50 dB poorer at 216 MHz than at 220 MHz.[19]

24. LAOAD's suggestion of using the 225-235 MHz band is also unacceptable. We note that it is allocated for Federal Government use and, therefore, have consulted with NTIA on the use of this band. We are advised that it is used for government military operations that are vital to national security interest. Specifically, NTIA states that this band is used for air-ground communications by high-performance military aircraft and other types of military mobile systems transmitting voice, data and spread spectrum communications. Therefore, this spectrum is unavailable for narrowband land mobile operations.

Current Use of the 220 - 225 MHz Band

25. As stated above, the Commission does not maintain records that provide an indication of the loading in the amateur bands. Therefore, in the *Notice*, the Commission relied heavily on the *Repeater Directory* to determine the amateur use of the 220-225 MHz band. The amateurs take exception to this and express great concern. They argue that the Commission did not have a good understanding of all of the use of this band by the amateur service. They claim that the entire 220-225 MHz band is needed by the amateur service and should be allocated for that purpose. Further, many amateurs claim that the 220-225 MHz band, including the 220-222 MHz portion, is already heavily used. They argue that a number of fixed and experimental uses are made of this band that are not reflected in the *Repeater Directory*. With regard to fixed operations, they note that the band is used for control links, auxiliary links, repeater links, packet radio and propagation beacons. With regard to experimental operations they note the band is used for weak signal operations including moon-bounce. Further they argue that the *Repeater Directory* is somewhat out of date and is not an exhaustive listing of amateur fixed/mobile/repeater operations.

26. There are a large number of amateurs who argue that the 220-222 MHz band is needed to support control links for the remote control of repeaters and packet radio. Many amateurs point out that current Commission rules require control links to be operated on frequencies above 220.5 MHz. Therefore they note that these operations cannot be reaccommodated in the amateur bands below the 220 MHz band. Further amateurs state that the propagation characteristics of higher amateur frequency bands do not provide as much range as the 220 MHz band.[20] In addition they argue the 222-225 MHz band is too heavily used to reaccommodate these fixed operations. This they claim requires that the 220-222 MHz band be kept for amateur use in cases where it is a long distance between the repeater site and the control station. With regard to packet radio many amateurs argue that 220-222 MHz is needed to provide for links between cities. Again they argue that packet operations could not be reaccommodated above 222 MHz due to heavy congestion.

27. ARRL, in its comments, provides specific data on the amateur fixed operations in the 220-222 MHz band. ARRL's data lists 773 fixed stations. It categorizes the data by both state and by frequency. ARRL states that its data is not exhaustive, but does note that the data establishes that there are a minimum of 773 fixed stations nationwide that must be reaccommodated if the proposals of the Commission's *Notice* are adopted. The appendix to ARRL comments shows that of the 773 fixed operations, 175 are control links.

28. ARRL also lists 1106 uncoordinated amateur stations that work with weak-signal operations in the 220-222 MHz band. It argues that these operations also stand to be effectively displaced from the 220 MHz band entirely, due to the saturation of the 222-225 MHz band. Further many amateurs argue that the 220-222 MHz band is needed for Earth-Moon-Earth (Moon-bounce) operations. ARRL states that there are about 200 moon-bounce operations that cost between $5,000 to $10,000 per station. It argues that these operations are not able to be reaccommodated in other bands and that this would result in the loss of millions of dollars to amateurs.

29. Land Mobile interests reject the claims of the amateurs. They argue that allocating the 220-222 MHz band to the land mobile service would have a minimal impact on the amateur service. They claim the 220-225 MHz band is currently very lightly used by the amateur service and that this spectrum could and should be put to other uses. SEA, Inc. claims that overall the amateur UHF and VHF bands are lightly loaded in comparison with the loading of the private land mobile radio service (PLMRS) UHF and VHF bands. In support of this claim, it notes that the amateur service has 69 MHz of spectrum in the VHF & UHF portion of the spectrum and approximately 425,000 licensees. In contrast the PLMRS has 90.8 MHz of spectrum and supports between 8 and 9 million transmitters. In analyzing this data, SEA states that the amateur allocations provide 1.62 MHz of spectrum per every 10,000 operators as opposed to only .11 MHz of spectrum for every 10,000 operators in the PLMRS. SEA concludes that the loading of the amateur bands is substantially less than that of the PLMRS even if it is assumed that all amateurs are active and operate in the VHF or UHF bands.

30. Land mobile interests also argue that the data filed by ARRL in its comments shows that the 220-222 MHz band is not extensively used, even for fixed point-to-point purposes. Forest Industries Telecommunications argues

that 773 fixed stations nationwide is a small number of stations for this two megahertz of spectrum. It notes, for example, that ARRL's data shows only a single station in this two megahertz in the entire State of Alabama. FIT further notes that the 1106 uncoordinated weak signal stations together with the 773 fixed operations yields only approximately 2000 total stations operating at 220-222 MHz nationwide.

31. Several land mobile interests expressed concern that the amateur service is using the 220 MHz band for fixed operations. They note that the Commission requires the fixed operations of other services to be located higher in the spectrum. They argue that VHF and other prime UHF spectrum should be reserved for mobile operations because mobile operations are more subject to technical transmission problems such as fading. They argue that the amateur service should move its fixed operations, such as control links, to the higher amateur bands near and above 1000 MHz. Further, SEA notes that dedicating channels for control links is wasteful and recommends that the Commission revisit its amateur rules. Specifically, it suggests that the Commission make it possible for amateurs to control and link their repeaters via their repeaters' input and output frequencies. SEA points out this is commonly done in the land mobile services.

32. We continue to believe that the ARRL *Repeater Directory* provides the best available representation of amateur fixed/mobile/repeater operations. We accept that the *Repeater Directory* is not a complete list of all coordinated repeaters and does not contain uncoordinated repeaters. But as ARRL notes in its comments, the *Repeater Directory* ". . . is indeed an exhaustive compilation of amateur repeaters as exists . . .".[21] Further we note that if the *Repeater Directory* is to be a useful document to the amateur service, which we believe it is, it must be accurate and as complete as possible. Therefore, we believe that it is appropriate to use the data from the latest *Repeater Directory* (1988-1989 edition) to at least determine general repeater use and loading of the VHF and UHF amateur bands. In addition, ARRL's comments provide by far the most comprehensive data regarding the use of the 220-222 MHz band. We believe that ARRL's comments, taken together with the data from the *Repeater Directory*, provides a good overall indication of the use of this band.

33. The *Repeater Directory* lists 1279 repeater operations nationwide in the 222-225 MHz band or only a little more than 23 repeater operations per channel pair. In the 220-222 MHz band, ARRL's comments list 773 fixed operations. This is less than eleven fixed operations per channel on a nationwide basis. This leaves an extremely large number of unused channels throughout much of the country. In fact, we find that there are only three states, California, New York and Texas, that even have enough operations to require sharing of frequencies. We also find that this band is lightly loaded in comparison with other amateur bands listed in the *Repeater Directory*. In particular, the 144-148 MHz amateur band has four times as many repeater operations per channel as the 222-225 MHz band. We conclude that from any perspective the 220-225 MHz band is lightly used by the amateur service.

34. We also find light use is made of this band for packet radio. The *Repeater Directory* contains 1272 packet listings in all bands nationwide. These listings include digipeater, gateway, message storage and network (high-level protocol) operations. Of these listings only nine percent are in the 220-222 MHz band and four percent are in the 222-225 MHz band. The majority of the packet operations, 80%, are in the 144-148 MHz band. Again we understand that the listing in the *Repeater Directory* is not exhaustive, but we believe that it provides a reasonably accurate representation of the relative use among the amateur bands. For this reason, we believe very few of the packet operations will be affected by this rule making as most are already in bands other than the 220-222 MHz band.

35. With regard to control links, we note that they are not used for voice or data communications but only to remotely control stations and therefore they transmit for very short time durations. For this reason, we agree with SEA that frequencies used for control links could be and should be better shared by amateur stations. Using an exclusive channel for each control link is extremely wasteful and poor spectrum management. Further, we note the Commission recently proposed allowing auxiliary operations, which includes control links, on all amateur frequencies. This proposal was opposed by many amateurs including ARRL.[22] There are obvious differences in the comments filed by the amateur community in that proceeding and this one. Nevertheless, if the amateur community believes lower frequencies are needed for auxiliary links it should petition the Commission to readdress the issue as it is beyond the scope of this proceeding.

36. With regard to moon-bounce, we note that it is unclear from ARRL's comments whether the 200 such stations it mentions represents stations operating in the 220-222 MHz band or all such stations. Nevertheless, our review of amateur literature indicates that much of this activity already takes place in other bands.[23] Further we note that the International Telecommunication Union's Regions I and III do not have an amateur allocation in the 220-225 MHz band and, therefore, would not have moon-bounce activity in this band. Since a principal objective of moon-bounce activity is to achieve long distance communications, the lack of an international amateur allocation at 220 MHz would be a disincentive to moon-bounce operations in this band.

37. We believe the 222-225 MHz band will be able to meet the amateur requirements for this portion of the spectrum. First we note that the suggested ARRL band plan (see the Appendix) already provides allotments for fixed and experimental operations including moon-bounce in the 222-225 MHz band. Second from our analysis above, we note that with the possible exception of a few areas, there are frequencies available. Therefore, we believe the fixed and experimental operations of the 220-222 MHz band may be reaccommodated in the 222-225 MHz band. Further, we believe this would have little impact on the amateur service as there should be little or no cost involved because most of the equipment in this band is tunable throughout the 220 MHz band.[24]

Future Growth

38. The amateurs also argue that the 220-222 MHz band is needed to accommodate the future growth of the amateur service. Specifically, they state that this band could be expected to experience heavy growth due to congestion in 144-148 MHz amateur band, growing interest in packet radio and new use of the band by Novice Operator Class licensees. Several also claim that that this band is needed for wideband long distance packet operations, which could be used for emergency communications.

39. In reviewing the growth of the amateur service we find that the service appears to be relatively stable with a modest average one percent annual growth in the past few years. In May 1983 there were 414,973 amateur operators and in May 1988 there were 436,912. This is about a 5.3 percent total growth over the last five years. With regard to Novice enhancement, resulting from the Commission's adoption of the *Report and Order* in PR Docket 86-161, we note that Novice operations in this band are only authorized above 222.1 MHz.[25] Therefore, this instant Rule Making will not require these operations to be reaccommodated in another band. With regard to the development of long distance packet operations, we believe there is ample spectrum available in the 222-225 MHz band, particularly in the rural areas between cities.

40. We note that there are a large number of frequency bands throughout the usable spectrum allocated and available to the amateur service. A number of these bands are capable and do support amateur operations similar to those of the 220-222 MHz amateur band. In particular are the 28-29.7 MHz, 50-54 MHz, 144-148 MHz, 222-225 MHz, 420-450 MHz, 902-928 MHz and 1240-1300 MHz bands.[26] These bands provide the amateur service with 128.7 MHz of spectrum. We believe that these bands along with the others allocated to the amateur service will provide more than adequate spectrum to meet its current and future requirements. Further we believe that the loss of use of the two megahertz from the 220-222 MHz band, which represents less than a two percent reduction in amateur spectrum, will have little impact on the growth of the amateur service.

Emergency Operations

41. Many of the amateurs maintain that the 220-222 MHz band is needed to support amateur communications during emergencies and natural disasters. This argument is supported by several local and federal government emergency agencies as well as by the National Red Cross.[27]

42. We are cognizant of the amateur community's contributions during emergencies and natural disasters. We have examined this issue closely and have concluded that allocating the 220-222 MHz band to the land mobile service will not impair amateurs' abilities to provide emergency communications. We note the Commission's rules specify in Section 97.107 (47CFR 97.107) that the Commission, in its discretion, may declare that a general state of communications emergency exists and specify the amateur bands, or segments of such bands, to be used for emergency communications. In this regard the 50-54 MHz, 144-148 MHz, 222-225 MHz, and 420-450 MHz amateur bands provide hundreds of communication channels. This should meet the local area communication requirements of any emergency or natural disaster. Further, other spectrum available to the amateur service may be used for emergency communications.

Conclusion on Amateur Use of the 220 - 225 MHz Band

43. In summary, based on the record in this proceeding, we find that amateur use of the 220-222 MHz band is light. Further, it appears that the existing users of this band can be reaccommodated in the 222-225 MHz band or in other amateur bands. We note in particular that, with the exception of 400 kilohertz of spectrum allotted for experimental and control links, all of the amateur activities listed in the amateur band plan for the 220-222 MHz band have exact duplicate provisions above 222 MHz (*i.e.*, 220.00-220.05 MHz for moon-bounce, 222-222.05 MHz for moon-bounce). Further, it appears that control links and packet radio can be located above 222 MHz with no difficulty in most parts of the country and with some coordination in a few areas of high density use. At the same time we conclude that there is sufficient spectrum available in the 222-225 MHz band to accommodate growth well into the future.

44. While we have concluded that amateur use of the 220-222 MHz band is light, we continue to recognize the important contributions of the amateur service and the need to provide adequate spectrum for this service. Amateurs are a vital resource of persons knowledgeable in the radio art and amateurs have a long history of contributions to the advance of radio science. Further, amateurs have on countless occasions performed public service and assistance in emergencies, including national and international disasters. However, as amateurs readily admit in their comments, a cloud has long hung over the amateur allocation in the 220 MHz band.[28] This prompted numerous requests and petitions over the years for reallocation of frequencies in the 220 MHz band. We believe this has discouraged amateurs from pursuing operations in this band and manufacturers from building equipment for this band. We also believe that greater use of this band by amateurs will be encouraged by resolving the allocation issues and providing a primary exclusive allocation of the 222-225 MHz band for the amateur service.

Broadcast Concerns About Potential TV Interference

45. Broadcast interests are concerned that a land mobile allocation in the 220-222 MHz band might cause interference to TV broadcast operations on channels 11 and 13.[29] While they support the development of narrowband land mobile equipment they argue that it should be done in the existing 150 MHz and 450 MHz land mobile bands. However, Maximum Service Telecastors (MST) request that if a land mobile allocation is made in the 220-222 MHz band, land mobile operations must be subject to appropriate technical and operational restrictions to protect TV broadcasting on channels 11 and 13 from interference.

46. Land mobile interests argue that a land mobile allocation at 220-222 MHz should not be made secondary to broadcast. They note that a land mobile allocation at 220-222 MHz would be four megahertz away from TV channel 13. Therefore, they claim there is little potential for interference to broadcast operations from land mobile operations. In support, SEA points out that TV broadcast channels 4 and 5 are separated by only 4 MHz, yet both are used in several cities without causing mutual interference. It also points out that the output power from a land mobile station is substantially less than a broadcast station and that this further reduces any potential interference to broadcast operations. LAOAD also points out that there are land mobile operations only 600 kHz below TV channel 7 (174-180 MHz), and there doesn't appear to be any significant occurrence of interference. It also notes that amateurs have been operating in the 220-222 MHz band without causing any interference to broadcast operations.

47. At this juncture it is only necessary that we determine whether the risk of interference to TV broadcast presents serious impediments to the allocation of the 220-222 MHz band to the land mobile service for narrowband operations. We are convinced that land mobile operation in the 220-222 MHz band is feasible without causing interference to TV broadcasting. We agree with

the commenters that the risk does not appear any greater than from the existing amateur operations in this band. Moreover, we find no basis for making the land mobile allocation secondary to TV broadcasting, particularly since four megahertz separates the land mobile allocation and the nearest TV channel. We note further that 316 kilowatt VHF television stations coexist in the same city with only 6 MHz separation.

Fixed

48. The American Petroleum Institute (API) requests that 0.5 MHz of the 220-222 MHz band be dedicated for narrowband fixed operations. It argues this is needed to accommodate supervisory control and data acquisition (SCADA) and multiple address systems (MAS). LAOAD, while supporting API's comments on fixed operations, is opposed to taking spectrum from the 220-222 MHz band. It argues that if narrowband land mobile operations are to materialize a minimum of two megahertz must be provided. However, LAOAD argues that a primary allocation to the fixed service should be made in this portion of the spectrum. It argues that the 216-220 MHz band is lightly used and requests the Commission to re-examine the rationale behind maintaining the allocations of the 216-220 MHz band.

49. We are maintaining the secondary fixed allocation in the 216-220 MHz band and are removing the primary fixed allocation from the 220-225 MHz band. As stated above, in the 216-220 MHz band we believe it is in the public interest to protect maritime mobile operations and to protect adjacent broadcast TV channel 13 operations in the 210-216 MHz band. In the 220-225 MHz band we believe that the needs of the land mobile and amateur services outweigh those of the fixed service. Further we believe that the needs of the fixed service can and should be accommodated in higher frequency bands. In this regard we note fixed operations may use directional antennas and are not as subject to rapid multipath flutter as are land mobile operations.

MISCELLANEOUS

Government Radiolocation

50. In its comments, the National Communications System (NCS) argues that there is new interest by the Department of Defense in using the 220-225 MHz band for government radiolocation operations. It states that research is currently being conducted for an Advanced Tactical Surveillance Radar on frequencies as low as 200 MHz. Therefore, NCS argues that it is imperative to continue radiolocation as a primary service in the 216-225 MHz band. NCS is opposed to the proposed primary land mobile allocation but has no objections to the amateur service continuing on a secondary basis in the 220-225 MHz band.

51. Providing a primary allocation for the government radiolocation service is beyond the scope of this proceeding. Further we note that NTIA, which has been delegated the authority specified in Section 305 of the Communications Act of 1934 as Amended, to make frequency assignments to government stations,[30] has notified the Commission by letter that it concurs with the allocations of this proceeding.[31] In addition, we note that government radiolocation requirements are currently undefined and that the 216-225 MHz band is only one of several bands in which it is conducting research. Therefore, it is impossible to determine if the 220-225 MHz band is needed or if it may be possible to meet these requirements in other spectrum allocated for government operations. Also as stated above, the 216-225 MHz band has been reallocated internationally and will only be available to existing radiolocation operations and then only on a secondary basis after January 1, 1990.[32]

3 MHz Allocation for Land Mobile

52. Forest Industries Telecommunications argues that three megahertz of spectrum should be allocated for narrowband land mobile operation. It notes that by increasing the allocation for land mobile that the frequency separation between transmit and received frequencies could be increased. In support, SEA argues that this is desirable because it would reduce the cost of equipment.

53. While we are sympathetic to the desire of the land mobile interests to reduce the cost of narrowband land mobile equipment, we do not believe the benefits of providing an extra megahertz for land mobile outweigh the negative impact that it would have on the amateur service. Current amateur repeater equipment in the 220-225 MHz band uses a separation between the transmit and receive frequency of 1.6 MHz. To decrease the amateur allocation to two megahertz would decrease the number of channel pairs for fixed/mobile/repeater operations from 54 channel pairs to 20 channel pairs or would require changing the frequency separation of the amateur equipment to one megahertz which would make current amateur fixed/mobile/repeater equipment obsolete. Neither of these options are acceptable.

Cordless Telephones

54. The Personal Communication Section of the Electronic Industries Association's Information and Telecommunications Technologies Group (EIA) argues that one megahertz of spectrum should be allocated from the 220-225 MHz band for cordless telephone use. Specifically, EIA requests that 220.0-220.5 MHz and 224.5-225.0 MHz be allocated for cordless phones. It argues that this transmit/receive separation is necessary for practical duplex operation at these frequencies.

55. Currently the Commission provides for cordless telephone operation under Part 15 of its Rules. We are not convinced that an allocation of frequencies is warranted in light of the low power operation of these devices.[33] In addition the 224.5-225.0 MHz frequencies requested by EIA for cordless telephones would have far greater impact on amateur operations due to existing repeater use. Moreover, we believe that this request is beyond the scope of this proceeding. Accordingly, we reject EIA's request.

SUMMARY AND CONCLUSION

56. As noted above, we have concluded that an allocation of spectrum for narrowband land mobile service is warranted. We have carefully weighed a variety of alternatives and find that allocation of the 220-222 MHz band is most appropriate for this purpose. It appears that existing amateur use can be reaccommodated in the 222-225 MHz band or in other amateur bands. Further, we believe the amateur service will benefit from an exclusive allocation of the 222-225 MHz band. We also note that NTIA supports the proposed allocation. In light of these factors

and other considerations as discussed above, we find that the reallocations of the 220-225 MHz band as stated above are in the public interest.

57. This proceeding addresses only the allocation of frequencies and not the service rules. A new proceeding will be initiated to develop procedural and technical rules for licensing private land mobile operations in the 220-222 MHz band. Further, because this band is shared between government and non-government users, coordination procedures will have to be developed. We believe it is important to allow all affected parties the opportunity to comment on these issues before allowing access to the band. Therefore, neither government nor non-government users will be allowed access to the 220-222 MHz band until final service rules have been adopted by the Commission.

58. Amateur stations may continue to use the 220-222 MHz band until private land mobile and government users are allowed access. Amateur operators are cautioned, however, to refrain from making any investments in equipment that would only be suitable for operation in this band. Amateur stations should begin an orderly transition of on-going operations in the 220-222 MHz band to other amateur service frequency bands so that an abrupt termination of such activities will not be necessary. Additionally, the amateur community may wish to address any changes to the amateur service rules that it finds desirable in preparation of the removal of the 220-222 MHz band, yet are beyond the scope of this proceeding. For example, the lifting of the prohibition on auxiliary link operation on some or all of the longer wavelength bands and placing a prohibition on repeater operation in a portion of the 222-225 MHz band are two matters the amateur community may wish to consider and petition for amendment.

FINAL REGULATORY FLEXIBILITY ANALYSIS

59. The Commission is adopting this Report and Order to reallocate the 216-225 MHz band. It responds to an unresolved issue of General Docket 80-739, Implementation of the 1979 World Administrative Radio Conference, which left the allocation of this band open until a separate proceeding could address all of the issues involved. It responds as well to three petitions for reallocation received by the Commission.

60. In response to our *Notice* we received several comments on the impact our proposal would have on small businesses. Several commenters allege that small businesses that provide amateur equipment would be negatively affected. On the other hand land mobile interests claim that the proposal would have a positive impact on a number of small businesses some of which are manufacturers but most whom would be users. Further the Commission received a letter from Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration (SBA), suggesting that many small businesses will be affected detrimentally by the proposal. SBA also suggests regulatory alternatives which it believes would be less burdensome. Specifically it suggests that the 218-220 MHz band be allocated for narrowband land mobile operations or that existing land mobile bands be used for narrowband operations. As discussed above in paragraphs 21 through 23 these alternatives are not satisfactory. Further, in addition to having significant technical problems, these alternatives may very well be less favorable to small businesses.

61. We recognize that there are some small businesses that manufacture amateur equipment that may be used in the 220-222 MHz band. We are also aware that some amateurs construct their own equipment and may sell units to other amateurs. However, it is our observation that much of the amateur equipment on the market is produced abroad by large companies. Further the comments addressing the manufacture of amateur equipment made no showing that their equipment could not be used in either the 222-225 MHz band or other amateur bands.

62. We believe many small businesses stand to benefit from the proposal. Two of the petitioners for this reallocation are small businesses attempting to expand the market for new spectrum efficient land mobile equipment. Further, many of the potential users of the proposed land mobile allocation would be small businesses that rely on radio to provide fast, efficient and competitive service. Therefore, after carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the mandate of the Communications Act of 1934, as amended.

ORDERING CLAUSES

63. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Subsection 4(i), 301, and 303(r), Part 2 of the Commission's Rules, 47 C.F.R. Part 2 ARE AMENDED as set forth below.

64. IT IS FURTHER ORDERED that this Order will become effective **October 1, 1988.**

65. IT IS ORDERED that the Secretary shall serve a copy of this Order on the Small Business Administration.

66. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

RULE CHANGES

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

The authority citation in Part 2 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066 as amended; 47 U.S.C. 154, 303.

Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

Section 2.106 is amended by modifying the 216-225 MHz band as follows:

Sec. 2.106 Table of Frequency Allocations

UNITED STATES TABLE		FCC USE DESIGNATORS	
Government Allocation MHz	Nongovernment Allocation MHz	Rule Part(s)	Special-Use Frequencies
(4)	(5)	(6)	(7)
***	***	***	***
216-220	216-220		
MARITIME	MARITIME	MARITIME (80)	
MOBILE	MOBILE	Private Land	

Aeronautical Mobile Fixed Radiolocation 627	Aeronautical Mobile Fixed Land Mobile 627	Mobile (90)
US210, US229 US274, G2	US210, US229 US274, NG121	
220-222 LAND	220-222 LAND	PRIVATE LAND
MOBILE Radiolocation 627	MOBILE	MOBILE (90)
US243, G2	627, US243	
222-225 Radiolocation 627	222-225 AMATEUR	AMATEUR (97)
US243, G2	627, US243	

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

The following is the suggested band plan for the 220-225 MHz band from the ARRL *Repeater Directory* (page 39).

220.00-220.05	EME (Earth-Moon-Earth)
220.05-220.06	Propagation beacons
220.06-220.10	Weak signal CW
220.10	Calling frequency
220.10-220.50	General weak signal, rag chewing and experimental communications
220.50-221.90	Experimental and control links
221.90-222.00	Weak signal guard band
222.00-222.05	EME
222.05-222.06	Propagation beacons
222.06-222.10	Weak signal CW
222.10	Calling frequency
222.10-222.30	General operation CW or SSB, etc.
222.34-223.38	Repeater inputs
223.34-223.90	Simplex and repeater outputs (local option)
223.94-224.98	Repeater outputs

FOOTNOTES

[1] An exception was made for the Navy SPASUR radar system operating in the southern United States in the 216.88-217.88 MHz band. This system tracks rocket and missile trajectories.

[2] The phase-out of the radiolocation service is being accomplished through international footnote 627 and domestic footnote US243 to the Table of Frequency Allocations. Footnote 627 states that the band 216-225 MHz is allocated to the radiolocation service on a primary basis until 1 January 1990. On and after 1 January 1990 no new stations in that service may be authorized. Stations authorized prior to 1 January 1990 may continue to operate on a secondary basis. Footnote US243 states that in the 220-225 MHz band stations in the radiolocation service have priority until 1 January 1990.

[3] *See Report and Order* in General Docket No. 80-1, 46 Fed. Reg. 15690 (March 9, 1981). More recently, on July 20, 1988, the Commission adopted a *Notice of Proposed Rule Making* in General Docket No. 88-372, proposing to remove geographic and other restrictions on the AMTS in order to encourage growth.

[4] *See Report and Order* in General Docket No. 80-379, 49 Fed. Reg. 2358 (January 19, 1984).

[5] Among the information considered by the FCC/NTIA planning group was the NTIA Report, *Spectrum Resource Assessment in the 216 - 225 MHz Band* (NTIA Report 81-85, September 1981).

[6] *See* : (1) *Petition for Rule Making* filed by Land Mobile Communications Council, RM-4829 (June 1984), requesting amendment of Parts 2, 22, and 90 of the rules and regulations to make available additional frequency assignments in the land mobile radio services; (2) *Petition for Rule Making*, filed by Sideband Technology, Inc., RM-4831 (July 1984), requesting reallocation of 6 MHz at 216-222 MHz to the private land mobile radio services for narrowband systems using 5 kHz channelling; and (3) *Petition for Rule Making* filed by LAOAD Radio and Microwave Communications Consultants, RM-4983 (March 1985, requesting a reallocation of 4 MHz at 216-220 MHz to the private land mobile radio services for narrowband voice and low speed data communications systems.

[7] On December 2, 1987, subsequent to the release of the *Notice of Proposed Rule Making* in this proceeding, TV Answer, Inc. submitted a petition requesting that 500 kHz be allocated somewhere between 216 and 222 MHz for a TV broadcast viewer response system. This petition will be considered on its own merits and addressed in a separate proceeding.

[8] *See Notice of Proposed Rule Making* in General Docket 87-14, 2 FCC Rcd, 796 (1987).

[9] *See Order Extending Time* for Comments, General Docket 87-14, DA87-364, 52 Fed. Reg. 13481, April 23, 1987, and *Order Extending Time* for Reply Comments, General Docket 87-14, DA87-798, 52 Fed. Reg. 25613, July 8, 1987.

[10] The Commission received a "Motion for Acceptance of Late-Filed Comments" (Motion) from United Parcel Service (UPS). The Motion was accepted by the Commission in an Order, DA88-310, 53 Fed. Reg. 8225, March 14, 1988. At that time the Commission opened up a reply comment period through March 31, 1988, to the UPS comments. The Commission received a number of comments including a Late-Filed Reply Comments from the National Communications System (NCS) who filed for The Secretary of Defense. NCS's Reply Comments are hereby accepted.

[11] *See* footnote 1 *supra*.

[12] These Congressional letters have been made a part of the public record in this proceeding.

[13] We also note the amateur service may well benefit from the development of narrowband technology.

[14] *See* Sections 7 and 303(g) of the Communications Act of 1934, as Amended, 47 U.S.C. 157, 303(g).

[15] *See ex parte* presentation in General Docket No. 87-14 filed by ARRL on March 31, 1988.

[16] The length of a quarter wavelength antenna, depending on frequency, would vary between about four and one half feet and about eight feet. An antenna of this length would be impractical for portable use. While shorter antennas can be used, they would be less efficient and require greater transmitter power to overcome the antenna losses.

[17] *See* note 3, *supra*.

[18] While a number of commenters discussed the issue of interference to TV channel 13 from land mobile service in the 216-220 MHz band, none provided any technical analysis showing how this band may be used by land mobile for base/mobile operations on a primary basis without causing interference to broadcast operations. We note that land mobile operation currently exists in a number of frequency bands that are adjacent to TV broadcast channels. However, in order to avoid interference to TV broadcasting these land mobile operations are subject to compliance with technical standards and operational constraints in the FCC Rules. These standards and constraints vary according to the bands involved. We make no finding here as to what standards may be appropriate if we were to permit land mobile operation in the 216-220 MHz band. However, because TV channel 13 is used widely throughout the country, it appears that the necessary interference protection criteria and operational constraints could potentially restrict the usefulness of the 216-220 MHz band for land mobile service.

[19] *See* R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations of the Inland Waterways Communications Systems*, FCC/OST TM 82-5 (July 1982).

[20] The ARRL states that the range at 220 MHz is 39 miles as compared to 27.5 miles at the 902 MHz band. Supplementary Reply Comments of ARRL at Appendix D. The coverage area is 1521 square miles at 220 MHz as compared with 756 square miles at 902 MHz according to ARRL. The organization did not compare range for the 420-450 MHz band because this band allegedly cannot support additional amateur operations.

[21] ARRL comments at 33.

[22] *See Order* in PR Docket 85-215, 51 Fed. Reg. 11759 (April 7, 1986). The proceeding was terminated without action.

[23] *See*, for example, The ARRL Handbook at p. 23-32. In discussing frequencies for moon-bounce, the Handbook states "The larger stations, especially on 144 and 432 MHz where there is a good amount of activity, often call CQ during evenings and weekends when the moon is at perigee and listen for random replies. Most of the work on 220, 1296 and 2304 MHz, where activity is light, is done by schedule."

[24] The shift in operating frequency from 220-222 MHz represents about a 1% shift in frequency. It should not be difficult to retune existing crystal-controlled equipment by this amount, particularly given the technical expertise of amateurs.

[25] *See Report and Order* in Private Radio Docket 86-161, 52 Fed. Reg. 5115 (February 19, 1987).

[26] The bands above 420 MHz are allocated either on a shared or secondary basis with other services.

[27] *See e.g.*, City of Santa Maria comments at 1, National Communications System reply comments at 4.

[28] Allocations in the 220 MHz region have been at issue since well in advance of the 1979 WARC. Moreover, the current amateur rules, with which all amateurs are required to be familiar, clearly state that the 220-225 MHz band ". . . is allocated to the amateur, fixed and mobile services in the United States on a co-primary basis. The basic principle which applies is the equality of right to operate. Amateur, fixed and mobile stations must operate so as not to cause harmful interference to each other." *See* Section 97.7(g)(4).

[29] Channels 11 and 13 are subject to different interference mechanisms. Broadcast interests argue that adjacent channel interference could be caused to channel 13 (210-216 MHz) due to the close proximity in frequency of land mobile signals at 220 MHz and that half-IF interference could be caused to channel 11 (198-204 MHz) due to spurious signals within the TV receiver generated in the presence of an undesired land mobile (or other) signal.

[30] *See* 47 U.S.C. 305.

[31] *See* letter from United States Department of Commerce, National Telecommunications and Information Administration dated March 1, 1988. In its letter NTIA notes DOD renewed interest in radiolocation systems in this region of the spectrum and states ". . . As these efforts evolve, additional consideration may have to be given to the status of the allocation to the radiolocation service in the 216-225 MHz band, or parts thereof."

[32] *See* footnote 2 *supra*.

[33] *See Order* in RM-5320, 53 Fed. Reg. 1781, January 22, 1988, wherein the Commission denied an allocation for cordless telephones in the 900 MHz region of the spectrum.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

ORDER

Adopted: August 23, 1988; Released: August 23, 1988

By the Commission:

1. On August 9, 1988, the Ad Hoc Telecommunications Users Committee (Ad Hoc), International Communications Association, Independent Data Communications Manufacturers Association, Tele-Communications Association, and Consumer Federation of America[1] filed a motion requesting an extension of the pleading cycle established in the Further Notice in the above-captioned proceeding.[2] On August 11, 1988, the American Petroleum Institute (API), Cable & Wireless Communications, Inc., the Competitive Telecommunications Association, Institutional Communications Company, Maryland People's Counsel, MCI Communications Corporation, the National Association of State Utility Consumer Advocates, and National Telecommunications Network [3] filed a similar motion. On August 12, 1988, the National Association of Regulatory Utility Commissioners (NARUC) filed a statement in support of the motions for extension of time by Ad Hoc and API. On August 17, 1988, the United States Telephone Association (USTA) filed an opposition to API's motion. At present, reply comments are due on August 26, 1988. Both Ad Hoc and API request that we extend the time for filing reply comments by one month, to September 26, 1988.

2. Ad Hoc states that the Commission's Further Notice is a detailed, lengthy proposal that has vast implications for dominant carriers, their customers, their competitors, and the public. Ad Hoc further states that interested parties filed more than 70 sets of comments in response to the Further Notice, and that reviewing, analyzing, and adequately responding to, these comments would be difficult in the time set for reply comments.

3. API contends that the complexity of the public policy and implementation questions presented by the Further Notice is evidenced both by the length of the Further Notice itself, and by the fact that more than 75 parties submitted comments. API states that a thorough evaluation of the record will require an extension of the time for filing reply comments. API also argues that although the Commission does not routinely grant requests for additional time, this is not a routine proceeding.

4. NARUC contends that an adequate review and analysis of the comments is not possible in the time set for reply comments by the Commission. In addition, NARUC argues that reply comments prepared in haste will be less useful to the Commission in its decision-making process. USTA asserts that parties have had ample opportunity to evaluate the record in this proceeding, and that the current pleading cycle provides sufficient time to permit all interested parties to comment. In addition, USTA states that further delay would adversely affect local exchange carriers that are in the process of deciding whether or not to continue participating in the NECA pools, and whether to initiate efforts to prepare the annual access tariff filing.

5. On August 18, 1988, Bellcore filed a study purporting to estimate the historical annual productivity gains of local exchange carriers in the post-divestiture period. The Bellcore study also attempts to measure the relative productivities of the Regional Bell holding companies as a group, and all other local exchange carriers.

6. As API has noted, it is this Commission's policy that extensions of time not be granted routinely.[4] However, in light of the large volume of comments filed, and the newly filed Bellcore study, we believe that an extension of the time for filing reply comments is warranted. Both API and Ad Hoc requested a one month extension of the time for filing reply comments. While we agree with the parties on the importance of a fully developed record, we must avoid undue delay in the consideration of an alternative regulatory structure that promises significant increases in consumer welfare. In response to the Notice of Proposed Rule Making in this docket, the Bureau granted a 15 day extension of the time for filing reply comments because of the large volume of initial comments filed.[5] We believe that a similar extension should be granted here. We therefore extend the time for reply comments by two weeks, to September 9, 1988.

7. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(j), 155(c), that the motions of the Ad Hoc Telecommunications Users Committee, International Communications Association, Independent Data Communications Manufacturers Association, Tele-Communications Association and Consumer Federation of America, and the American Petroleum Institute, Cable & Wireless Communications, Inc., the Competitive Telecommunications Association, Institutional Communications Company, Maryland People's Counsel, MCI Communications Corporation, the National Association of State Utility Consumer Advocates, and National Telecommunications Network, described in paragraph 1 above, ARE GRANTED IN PART and DENIED IN PART, to the extent indicated in para. 6, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] We will refer to this group of parties by the first party listed, "Ad Hoc."

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rule Making, 3 FCC Rcd 3195 (1988).

[3] We will refer to this second group of parties as "API."

[4] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[5] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order, 2 FCC Rcd 6958 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
relating to program exclusivity
in the cable and broadcast industries

REPORT AND ORDER

Adopted: May 18, 1988; Released: July 15, 1988

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Dennis concurring in part, dissenting in part and issuing a statement.

TABLE OF CONTENTS

	Paragraphs
I. Introduction	1 - 6
II. Syndicated Programming Exclusivity	7 - 109
A. Background	7 - 23
1. Market Regulation Before 1980	9 - 17
2. The Syndicated Exclusivity Report	18
3. The 1979 Notice of Proposed Rule Making	19
4. The 1980 Report and Order	20 - 23
B. Discussion	24 - 89
1. Changed Circumstances	24 - 48
2. The Purpose and Function of Program Exclusivity	49 - 89
C. Rules	90 - 109
III. Network Programming	110 - 123
IV. Authority	124 - 162
A. The Copyright Revisions Act of 1976	125 - 131
B. The Cable Act of 1984	132 - 158
C. Constitutional Considerations	159 - 161
D. Conclusion	162
V. Territorial Exclusivity	163 - 170
VI. Procedural Matters	171 - 178

I. INTRODUCTION

1. In this *Report and Order*, the Commission adopts changes to its rules regarding program exclusivity to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers. Today's video marketplace calls for an impartial regulatory referee and a common set of fairly-enforced ground rules. This will provide proper market incentives for video outlets to deliver the programming that will maximize consumer benefits rather than foster the economically wasteful duplication of programming that is all too likely under our current rules.

2. This proceeding is a direct outgrowth of concerns we expressed in our 1986 "must-carry" decision.[1] We stated there that "the progressive maturation of the cable industry and the tensions created by the development of the video distribution market during the last several years" required that we (1) reexamine policies and legislation that, while furthering important public policy concerns, may have created distortions in that market and (2) reassess whether those policies and legislation continued to "truly maximize consumer choice in programming options or to otherwise serve our public interest objectives."[2] Among the governmental actions that we explicitly identified in the must-carry proceeding as requiring reexamination were the compulsory copyright law and our decision in 1980 to repeal our syndicated exclusivity rules. We directed Commission staff to initiate inquiries to study the effect of the compulsory licensing scheme, our network non-duplication rules[3] and the absence of syndicated exclusivity rules on consumer welfare.[4] In order to isolate copyright issues from the communications issues presented in this docket, we decided that copyright issues should be studied separately. In Gen. Docket 87-25, which we initiated by a *Notice of Inquiry* adopted on February 12, 1987,[5] we have been examining in particular whether to recommend to Congress that it revise the compulsory licensing scheme prescribed by the Copyright Revision Act of 1976.[6] In this docket, however, we have restricted our attention to the effects on the television distribution market and the competitive imbalance resulting from our current cable-broadcast exclusivity rules. Because changes to those rules could affect or be affected by our territorial exclusivity rules,[7] we also sought comment on our territorial exclusivity rules.

3. We opened this proceeding in February, 1987, with the adoption of a *Notice of Inquiry and Notice of Proposed Rule Making*.[8] That *Notice* posed three major questions: (1) whether we should amend our program exclusivity rules to reinstitute some form of syndicated exclusivity rules that would permit broadcasters to negotiate for enforceable exclusive exhibition rights with respect to syndicated programming; (2) whether we should modify our network non-duplication rules which currently permit network affiliates to show network programming on an exclusive basis; and (3) whether we should relax or eliminate the territorial exclusivity rules which delineate the maximum amount of geographic exclusivity a broadcaster may obtain vis-a-vis other broadcasters. The *Notice* tentatively concluded that such action would be in the public interest. Comments responding to the *Notice* were filed on July 22, 1987, and replies followed on September 22, 1987.[9]

4. After full and careful review of those comments, we answer the first two questions posed in the *Notice* in the affirmative. In recent years we have recognized that, for those markets in which conditions are conducive to its development, competition is a far more effective instru-

ment than direct regulation for achieving the public interest goals of the Communications Act.[10] An important advantage of competition over regulation is that there is no need to forecast or prejudge which suppliers or which particular methods of supply will best serve the public interest. Different program suppliers compete for customers on the basis of their particular skills and advantages, and success in the marketplace is tied to success in meeting consumer demands. Under otherwise competitive conditions, a regulatory framework that limits the ability of some competitors to compete on the same terms as other competitors introduces a bias into the market process. With this bias, success in the marketplace becomes an artifact of regulation rather than an indicator that the successful competitor is meeting consumer demands efficiently.

5. Our current regulatory regime governing program exclusivity introduces such a bias. Although the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries, broadcasters of syndicated programs are prevented by the current lack of rules from obtaining exclusivity against duplication of their programs through cable retransmission of distant broadcast signals. *Only* broadcasters of syndicated programming are denied this ability in the delivery of video product. All others, including broadcasters of network programming, enjoy the ability to obtain exclusivity. Our current network nonduplication rules also limit the ability of broadcasters to obtain the degree of program exclusivity that they would like with respect to cable systems and that would be appropriate to promote competitive market efficiency. Cable operators, in contrast, can directly obtain any and all programming for distribution on an exclusive basis. In addition, they can acquire broadcast signals for retransmission regardless of any exclusivity agreements the broadcasters may have purportedly obtained from the producer. We find no compelling public interest argument that would justify such an asymmetric treatment of competitors and, more importantly, we see many reasons to think that viewers and the public interest are being poorly served by these arrangements.

6. Therefore, in this *Report and Order*, we make two changes to our rules relating to program exclusivity in the cable and broadcast industries. First, we extend exclusivity protection to broadcasters who purchase syndicated programming, by adopting simplified syndicated exclusivity rules that should promote fair and efficient competition among all the video programming delivery systems from which viewers may select. We emphasize that our actions herein do not directly bestow exclusivity rights on broadcasters. These rules will simply permit, but not require, broadcasters to obtain the same enforceable exclusive distribution rights in syndicated programming that all other video programming distributors already enjoy. Second, we modify our network non-duplication rules, extending their scope to any retransmissions of network programming. Part II of this *Order* presents the basis for our decision concerning syndicated exclusivity. Part III addresses network non-duplication. Part IV deals with our authority to undertake the actions herein, and Part V addresses territorial exclusivity issues.

II. SYNDICATED PROGRAMMING EXCLUSIVITY

A. Background

7. Over the past thirty years, the regulatory course of the local distribution market for video programming has been full of twists and turns. These peregrinations reflect both unanticipated developments in that market and our evolving understanding of which regulatory policies would best assure that both cable and broadcast facilities operate in a way that maximizes consumer welfare and thus, the public interest. The actions we take today are only the latest of many corrections to our regulatory course. Like those preceding them, these changes are prompted by both market and analytical developments and follow from our close reexamination of whether, in light of those developments, our current market rules still best serve the public interest.[11]

8. In this section we briefly review our past efforts to regulate the local video distribution market. This summary will not only discuss how we came to abandon the syndicated exclusivity rules in 1980, but will also show that the action we take today is only part of our continuing effort to reexamine our communications policies and to revise or, if necessary, eliminate policies that, under current market conditions, no longer serve the public interest.

1. *Market Regulation Before 1980* [12]

9. Although the first cable system began retransmission of broadcast signals in 1948, the Commission was initially hesitant to regulate such systems. But concern about the impact of unregulated cable systems upon local broadcasters gradually overcame the Commission's initial reluctance. [13] In the *First Report and Order* in *Docket 14895* in 1965,[14] the Commission expressed its belief that, because cable would never be available to everyone for both technical and practical reasons, cable could not be a technology upon which the Commission could rely to discharge its statutory obligation to maximize the diversity of video programming available to the public. The Commission had already determined that this obligation could best be met through reliance on the allocation schemes for VHF and UHF television. Thus, at this stage of cable's development the Commission was principally concerned that cable's growth not endanger these allocation schemes and the economic viability of local broadcast television. In order to protect these schemes, the Commission concluded that the public interest required more than mediation among those desiring to provide service to the public. Rather, it required, in the Commission's view, exercising a firm administrative grip on the development of cable. This outlook led to a regulatory regime the first part of which required carriage of local signals. In the second prong of its policy, the Commission sought to identify those signals a cable system could carry without threatening the continued financial viability of individual local broadcasting stations within the system's service area. The Commission had concluded that cable systems' importation of distant signals to duplicate such programming was an unfair method of competition. Thus, among the rules adopted at this time were uniform non-duplication rules to protect both network programming and syndicated programming for which local broadcasters had negotiated exclusive exhibition rights. The basic principle applied was that nonduplication benefits were "something to which a station is entitled, without a showing of special need, within its basic market area."[15] The Commission explained:

> Our aim . . . is not to take any programs away from any CATV subscriber, but to preserve to local stations the credit to which they are entitled -- in the eyes of the advertisers and the public -- *for presenting programs for which they had bargained and paid* in the competitive program market.[16]

10. The *Second Report and Order* in *Docket 14895*,[17] adopted in 1966, extended this regulatory regime, which had at first applied only to cable systems using microwave facilities, to reach all cable systems. All cable systems were thus obligated to notify the Commission before they could carry any broadcast signal. Concerns about the effects of signal importation on local broadcasters led the Commission to require a hearing and Commission authorization before a cable operator in one of the top 100 local markets could import any distant signals. In smaller markets, a hearing was not required unless there were objections to the proposed signal importation. The standard for determining whether the cable system should be authorized to carry the distant signal was whether its carriage was consistent with "the establishment and healthy maintenance of television broadcast service in the area."[18] The *Second Report* also modified the non-duplication rules. Concluding that same-day protection was sufficient for network programming because it was aired simultaneously, except for time zone differences, the protection afforded this programming was reduced from a thirty day period to same-day protection. In addition, despite the acknowledgment that the non-duplication rules adopted the preceding year afforded "at best minimal" protection of broadcasters' contractual right to exclusive exhibition of syndicated programming, the *Second Report* refused to expand the protection afforded to syndicated programming under the non-duplication rules.[19]

11. By 1968, it was clear that, by deciding to review essentially every decision of a cable operator to import a distant signal, the Commission had assumed an impossible task. The resulting administrative problems were harming rather than enhancing the development of the local distribution market for video programming. The Commission froze almost all processing of requests for permission to carry distant signals, and began a series of Rule Makings and inquiries to determine a workable, comprehensive regulatory scheme that would address all the communications policy issues raised by cable's entry into the local television market for video programming.[20] The Commission's efforts were complicated by the lack of legislation to clarify the relationship among copyright holders, broadcasters to whom they had conveyed at least some of their rights in the copyrighted programming, and cable operators. In *Fortnightly Corp.* v. *United Artists Television, Inc.*,[21] the Supreme Court had held that retransmission of local broadcast signals did not constitute a "performance" to which copyright liability should attach, but the status of retransmissions of distant signals remained uncertain.[22] While the Commission believed that the two matters -- cable regulation and copyright -- could and should be considered separately,[23] it believed that the absence of congressional action on the copyright issue limited the options for addressing the significant communications policy issues raised by cable's entry into the local television market for video programming.[24] In particular, requiring retransmission consent as a solution to the distant signal issue seemed problematic in the absence of clear Congressional intent.[25]

12. Throughout this period the Commission encouraged the major stakeholders in the copyright controversy to work toward some kind of compromise that would facilitate the efforts of both Congress and the Commission to fulfill their respective responsibilities to set copyright and communications policy. In late 1971, under the auspices of the Office of Telecommunications Policy in the White House, these groups were able to reach a "consensus agreement" on the content of both copyright legislation and regulatory policy for cable television. While the Commission had already expressed its intent to follow much of the regulatory course that these groups endorsed,[26] the consensus agreement proposed that the Commission adopt specific syndicated exclusivity rules that would afford at least those broadcasters in major markets an enforceable right to exclusive exhibition of syndicated programming. Shortly afterward, in the 1972 *Cable Television Report and Order*, the Commission adopted as Commission policy the major terms of the consensus agreement relating to regulation of cable television.[27]

13. That *Order* presented a comprehensive scheme for regulating signal carriage and retransmission, origination, technical standards, ownership diversity, channel capacity, interactive services, and allocation of regulatory authority among federal, state and local regulators. The 1972 *Cable Television Report and Order* included must-carry rules that were designed to ensure a local broadcaster's access to cable subscribers.[28] Distant signal rules limiting the number of signals that cable systems operating within recognized television markets could import were also adopted to ensure the competitive posture of local broadcasters.[29] "Leapfrogging" rules further limited the selection of distant station signals that these systems could import.[30] The Commission amended its network non-duplication rule provisions to reduce the period of protection from same day to simultaneous broadcasts because it found that cable subscribers' interest in time diversity outweighed broadcast licensees' interests in retaining the more extensive protection.[31]

14. It also adopted the syndicated exclusivity rule provisions proposed in the industry consensus agreement. Those rule provisions authorized local stations which had purchased exclusive exhibition rights to syndicated programming to demand that cable systems located in the station's service area delete such programming from imported distant signals. Copyright holders were also given certain rights to request deletion. The scope of these rights varied by market size and type of programming. In the top fifty markets, cable systems were required to delete all programs under exclusive contract to the local broadcaster, upon request. In addition, program owners could require deletion of their programs from distant signals for a period of one year after the programs were first licensed for exhibition anywhere in the country, in order to permit orderly marketing of syndicated product. Similar protection was given to stations in the second fifty markets, with certain limitations. For instance, if the imported program appeared during prime time, no deletion was required unless the local broadcaster was also showing the program during prime time. The rules also prescribed the duration of exclusivity in the second fifty markets. For off-network series, a local broadcast station could request deletion from the date of first showing to completion of the first-run of the series, but for no longer than one year. Broadcasters had deletion rights for first-run syndicated series for a period of two years from the date of first showing;

for first-run, non-series feature films for two years from the program's availability date; and for other product, for the shorter of one year from the date of purchase or the end of the first-run. The rule provisions did not afford any protection to stations in markets outside the top 100. Broadcasters were required to notify affected cable systems of all details of the requested deletion at least six calendar days in advance.

15. Because the marketplace had not fully developed by 1972 the Commission was less confident than we are today in the ability of market forces to shape the local distribution market for video programming in ways that would further the public interest, by maximizing both the diversity of programs and delivery media available to the viewing public. As a result, the Commission then believed that it was necessary to impose the comprehensive regulatory scheme embodied in the *Cable Television Report and Order*. As our information about and experience with the effects of cable's entry on local television markets increased, however, the Commission grew more confident of competition's ability to assure that our public interest concerns would be met. Finding some of the signal carriage rules no longer necessary to protect the public interest, the Commission began to relax and even to repeal them. The first significant revision to reflect this new found confidence occurred in 1976, with the elimination of the "leapfrogging" rules. The Commission explained:

> [I]t is our judgment that the leapfrogging restrictions generally should be deleted from our rules and the decision as to which signals are selected for carriage left to the marketplace, the judgment of the cable system operator, and the desires of the cable system subscribers . . . .[32]

The Commission also relaxed the rules governing importation of signals carrying certain categories of programming because it found that relaxation would increase the diversity of programming available to cable subscribers without any adverse effect on standard television service.[33] Finally, cable systems with fewer than 1000 subscribers were exempted from compliance with our nonduplication rules.[34]

16. On October 19, 1976, Congress addressed the status of cable under the Copyright Act.[35] The Copyright Revision Act of 1976 granted cable systems a compulsory license to retransmit all

> secondary transmissions to the public . . . of a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a work . . . where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the . . . Commission.[36]

The legislation also prescribed a statutory formula for calculating the royalties owed by a cable system for exercising its compulsory license and established an administrative mechanism for compensating copyright holders whose work was retransmitted by the cable system.[37]

17. Once again, changing circumstances caused the Commission to reexamine the rules governing the local television market.[38] One month after enactment of the new copyright law, it began an inquiry to review the "purpose, effect, and desirability of" the syndicated exclusivity rules.[39] The next year, the Commission began a related inquiry into the distant signal rules.[40] The inquiry into the syndicated exclusivity rules' continued vitality led in 1979 to adoption of the *Report on Cable Television Syndicated Exclusivity Rules*.[41] The *Economic Inquiry Report*, which was the result of the distant signal inquiry,[42] was adopted at the same time. Conclusions reached in the two reports led to the adoption of a *Notice of Proposed Rule Making*, which effectively merged the distant signal and syndicated exclusivity proceedings and proposed the elimination of both sets of rules.[43] Because the *Syndicated Exclusivity Report* and the *1979 Notice of Proposed Rule Making* laid the foundation for the 1980 decision to repeal the syndicated exclusivity rules, we discuss the reasoning and the conclusions reached in both.

2. *The Syndicated Exclusivity Report.*

18. The *Syndicated Exclusivity Report* characterized the syndicated exclusivity rules adopted in 1972 as restrictions designed to protect the non-network programming of television stations in the major markets. It correctly rejected this model of regulation for local program distribution markets; it failed, however, to analyze fully the role played by enforceable, privately negotiated exclusivity arrangements in the operation of a fully competitive market for such program distribution.[44] Instead, the report performed a cost-benefit analysis to determine whether the retention of our syndicated exclusivity rules would be in the public interest. The benefit associated with their retention was identified to be their positive effect on broadcasters' financial ability to serve the viewing public. This benefit was counterbalanced against the "reduction in video services which the rules impose upon the subscribers and potential subscribers of cable television." The Commission found that the elimination of the rules would have negligible effects on the size of local station audiences,[45] and consequently would not significantly harm any broadcaster. Since audience sizes would be largely unaffected in the short run, the Commission concluded that the near-term effect on program supply would also be minimal. While the Commission predicted that the long-term effect of the rules' elimination would be more significant,[46] it believed that any deleterious effects would be more than offset by growth in population and demand for advertising exposure. The Commission could not determine the long-term effect on program supply and the competitive imbalance in local television markets. With regard to the benefits if the syndicated exclusivity rules were deleted, the Commission concluded in a few short sentences that viewers would benefit from increased diversity and that the development of new cable systems would increase. Thus, it concluded that when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal.

3. *The 1979 Notice of Proposed Rule Making.*

19. The *1979 Notice of Proposed Rule Making* proposed to eliminate both the rules limiting the number of distant signals a cable system could import and the syndicated exclusivity rules. It highlighted the reasons given in the past for heavily regulating the signals that cable operators could carry: (1) to assure that cable would not undermine over-the-air broadcasting and thereby deprive the poor

and those not living in cabled areas of video service; (2) to ensure the provision of local service; (3) to limit what was perceived to be unfair competition from cable; and (4) to protect the production of programming.[47] It did not distinguish between the effects of the distant signal importation rules and the syndicated exclusivity rules on the operation of the local distribution market. Consistent with the analysis of syndicated exclusivity presented in the *Syndicated Exclusivity Report*,[48] in which the Commission had rejected a protectionist perspective toward local broadcasters, the *1979 Notice of Proposed Rule Making* focused on the effects of exclusivity arrangements on the program production market. In focusing on the production market, however, it failed to consider adequately the competitive posture in which local broadcasters would be left in the absence of syndicated exclusivity rules.[49] For instance, in considering the issue of "unfair competition," the notice simply concluded that the 1976 copyright legislation had cured the problem. As we discuss below, however, the copyright legislation addressed only the basic relationship between copyright holders and cable operators retransmitting their copyrighted works; it contemplated that the Commission would continue its responsibility for determining whether to modify the regulatory treatment of exclusivity arrangements between broadcasters and copyright holders.[50]

4. The *1980 Report and Order*.

20. Consistent with the reasoning and findings presented in the *Syndicated Exclusivity Report* and the *1979 Notice of Proposed Rule Making*, the *1980 Report and Order* in *Dockets 20988* and *21284* [51] concluded that the benefits of repealing the syndicated exclusivity rules adopted in 1972 outweighed any negative consequences. The *1980 Report and Order* reflected the Commission's realization that it could rely on cable to play an important role in increasing viewers' welfare, and that unnecessary regulatory impediments to its growth should be eliminated. The removal of the distant signal and syndicated exclusivity rules represented the culmination of a sweeping package of intended reforms, most of which properly removed restrictions on the ability of cable to compete effectively in meeting viewer demand. The removal of restrictions on the number of distant signals a cable system could carry, for example, allowed cable to expand the range of programming available to its subscribers. Thus, consumers were afforded a true increase in program diversity.

21. The benefits of eliminating syndicated exclusivity protection, previously identified in the earlier report and the *1979 Notice of Proposed Rule Making*, were to (1) increase programming and time diversity for cable subscribers and (2) foster the development of new cable systems. The potential negative consequences identified were a reduction in program production and harm to the fundamental viability of local broadcasters. Repeating the analysis presented in the *Syndicated Exclusivity Report*, the *1980 Report and Order* found that the effects of the rules' repeal on broadcasters and on program supply would be minimal because the growth in demand for advertising would increase the revenues of all participants in the local distribution market, with or without syndicated exclusivity rules. There was no indication, however, that the Commission foresaw that cable itself would become an important competitor for local advertising revenues. Nor did the Commission discuss the competitive function of exclusive arrangements in the broadcast-cable marketplace.

22. This cost-benefit analysis was based on certain factual premises, which, with the benefit of hindsight, have proven to be understated or untrue. In the next section we review the assumptions underlying the *1980 Report and Order* in light of today's marketplace realities. We conclude that using the same analysis as that used by the Commission in 1980 leads to a different balance of costs and benefits in today's marketplace. Were the Commission to ask the same questions as in 1980, today's answers would clearly justify a reimposition of the syndicated exclusivity rules.

23. Further analysis leads us to conclude, moreover, that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects. First, the Commission justified the rules' repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market.[52] We now recognize that the focus of our inquiry was misdirected to the extent that it examined the effects of repeal or retention on individual competitors rather than on the manner in which the competitive process operates. Second, the Commission failed to analyze the effects *on the local television market* of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts. Virtually neglected were such issues as the effects on promotional incentives of broadcasters, the tendency of cable's reliance on broadcast product to reduce incentives to produce original product, and most importantly, the harm to viewers as a result of withholding, from one group of competitors, an important and widely used tool available to others.[53] We have only recently come to understand fully the extent to which broadcasting and cable are in competition with each other.[54] The incomplete 1980 analysis led the Commission to mischaracterize the role that exclusivity rules play in the functioning of the local television market. Equally important, this mischaracterization caused it to ignore the effect on that market of the assymmetry introduced when broadcasters' enforceable exclusivity rights in syndicated programming were abolished while both cable operators and network affiliates providing network programming continued to enjoy such enforceable rights. In paragraphs 49-89 below, we examine the importance of enforceable exclusivity to the competitive process, the local television distribution market and, in particular, television viewers. We conclude that, under this analysis as well, the benefits to the public of extending exclusivity protection to syndicated programs outweigh any associated costs.

B. Discussion

1. *Changed Circumstances*

24. As discussed above, the 1980 decision[55] to repeal the syndicated exclusivity rules was based on certain assumptions. First, the Commission at that time had only just begun to change its view of cable as a supplement to over-the-air broadcasting, and it still failed to appreciate fully the role that cable would come to play as a full competitor in the video marketplace. Second, in analyzing the costs and benefits of syndicated exclusivity, the Commission found that the absence of such rules would cause little harm to the fundamental viability of broadcasting. The Commission predicted little harm from cable's importation of duplicate distant signals which would divert

viewers from broadcasters. And, it found that the effects of any diversion would be slight because the demand for advertising was expected to increase so that advertising revenues for all participants in the distribution market would increase, even absent syndicated exclusivity rules. Third, the Commission asserted that significant benefits to viewers would result from the time diversity afforded by cable importation of duplicative signals. In other words, the 1980 decision was based on a particular cost-benefit calculus derived from one set of assumptions about how the world would unfold. Whatever the technical merits of that analysis or its suitability for deciding issues relating to syndicated exclusivity at that time, there is little question that the development of the television marketplace has been different from what was anticipated when the decision was made to rescind syndicated exclusivity rules.[56]

25. *Cable as Competitor.* Among other key assumptions underlying the 1980 decision, the Commission predicted that cable would not become as universally available as over-the-air broadcasting, even if the artificial restraints that had hindered its development were removed. For instance, the Commission believed that cable was unlikely to make substantial inroads into metropolitan markets where a large number of off-the-air signals were available, and that not even half the households in the United States would have access to cable in the foreseeable future. [57] Time has proved these predictions inaccurate. In fact, cable has emerged as a major competitor for programming, audiences, and advertising revenues. More than 80 percent of television households in the United States currently have access to cable. More than half the television households in the United States, including many in metropolitan areas,[58] are already cable subscribers, and the number continues to rise rapidly.

26. Over the past eight years, the number of cable systems has nearly doubled, from 4079 systems serving about eight thousand communities at the end of 1979 to more than 7,800 systems serving about 21,600 communities in mid-1987.[59] Most of the systems in existence in 1979 had 12 channels, but by 1987, 91 percent of all cable subscribers had access to 20 or more channels; systems serving 77 percent of all subscribers had 30 or more channels.[60] In 1979 there were 76.3 million television households in the United States (98.7 percent of all households); 27 million of these households had access to cable, and of these, 14.8 million actually subscribed to cable (19.4 percent of all TV households and 54.8 percent of all homes passed by cable).[61] By the end of 1987, more than 81 percent of the approximately 89 million televison households in the United States had access to cable, and nearly 45 million of these were cable subscribers (50.5 percent of all television households and 62 percent of households with access to cable).[62] Moreover, much of the growth in the number of cable systems and cable subscribers between 1979 and 1987 took place in major urban markets not yet wired for cable in 1979.

27. A significant reason for the increase in cable subscribers and penetration has been the growth of programming options available to cable subscribers. In 1979, satellite network distribution of cable programming was relatively new. Indeed, two of the most popular cable networks -- Cable News Network (CNN), and USA Cable Network -- did not begin service until Spring 1980; and a third, MTV, did not begin until summer 1981.[63] Of the top 20 satellite cable services (including superstations) in 1987, only six had begun operating by the end of 1979.[64] At the end of 1979, 24 video program services -- many of them part-time -- were distributed by satellite to cable systems;[65] by the end of 1987, this number had risen to more than 85 cable programming services.[66] Except for the pay cable channels like HBO, most of these cable networks are financed by both national and, increasingly, local advertising and small monthly per-subscriber fees paid to programmers by cable operators. The vast range of cable programming today in comparison with eight years ago reflects new industry alliances and program release patterns.[67] Even more importantly, it reflects the fact that cable, throughout this period, has been successful in obtaining significant programming on an exclusive basis.[68]

28. Growth in cable programming choices has been accompanied by growth in cable audiences, which in 1979 were too small to be measured by the national television ratings services.[69] Although the three-network primetime audience share was beginning to slip even then, it nevertheless stood at 92 percent in November 1979;[70] by November 1987, however, it had fallen to 75 percent.[71] Cable competition has caused much of this loss; indeed, the drop has been even greater in cable households and in other dayparts. In April 1987, for example, network affiliates had only 52 percent of the weekly viewing audience in cable households, while advertising-supported cable networks (including superstations) had a 27 percent share, pay cable services had an 11 percent share, local independents had a 13 percent share, and public television stations had a 3 percent share.[72]

29. This audience increase has been reflected in a growth in cable revenues which has been explosive. In 1979, when the Commission was considering changes in its syndicated exclusivity rules, cable operating revenues were $1.8 billion, of which $334 million came from pay programming and less than $5 million came from local advertising.[73] In 1980, the first full year of national cable network advertising sales, revenues were about $45.5 million.[74] In contrast, the 1979 advertising revenue of broadcasters was $8.9 billion ($4.0 billion to the networks and $4.9 billion to local broadcasters).[75] In 1987, cable operating revenues had grown to $11.4 billion, including $3.7 billion in pay cable revenue, $833 million in national advertising revenue, and $264 million in local advertising revenue, with these latter increases in advertising revenues representing substantial jumps over their 1986 levels.[76] During this same period, broadcast revenues grew to $23.3 billion, of which $8.8 billion comprised network advertising revenue, while local broadcasters' share of advertising revenue (including barter) totalled $14.5 billion.[77] Thus, cable television's share of the television advertising revenue climbed by almost $1 billion from less than one-half of one percent in 1979 to more than 6 percent in 1987, and it is expected to keep rising.

30. To summarize, in 1980 cable penetration stood at only 19% and was expected to reach, at most, 48%. Today, penetration is 51% and is expected to reach 60% by 1996.[78] In 1980, program choices for cable subscribers, except for the retransmission of broadcast signals, were few and expected to remain so.[79] Today there are 85 cable program services in operation and more planned each day.[80] In 1980, the cable industry collected only $45.5 million in advertising revenues. In 1987 annual advertising revenues were $997 million. By 1990 alone, these revenues are expected to increase to $1.9 billion. In short, cable television is clearly no longer the community antenna

supplement that we once thought it was; it is a full player in the video marketplace, and a vigorous competitor for programming, audiences, and advertising revenues.[81]

31. This conclusion is accepted by cable, broadcasters, and outside observers alike. Our own rules implementing the deregulation provisions of the 1984 Cable Act similarly recognize that broadcast stations may effectively limit cable's market power; and therefore that broadcasting and cable are competitors in the same market.[82] Our reliance on the broadcasting industry to serve as an effective competitor to cable underscores the importance to viewers and to the overall public interest that the competitive framework be balanced.

32. Largely as a consequence of these changes, the potential for duplicating broadcasters' programs, diverting broadcasters' audiences and advertising as a result of an unbalanced regulatory regime is far greater than we expected it to be when we rescinded our syndicated exclusivity rules. Thus, even if we were to rely on the analytical framework used by the Commission in 1980 when deleting syndicated exclusivity, we would today reach a different result. Because of the significantly changed circumstances detailed above, the 1980 cost-benefit analysis conducted leads today to the conclusion that the benefits of syndicated exclusivity outweigh any costs.

33. *Cost of No Syndicated Exclusivity Rules*. The Commission in 1980 believed that cable's importation of duplicate distant signals would not divert a significant number of viewers from the local broadcaster. In addition, the Commission believed that any audience diversion that might occur would nevertheless be harmless because advertising revenues were expected to increase for all participants in the distribution market (which did not at that time include cable in any meaningful way). The comments submitted in the current proceeding provide an analysis of duplication, diversion, and economic harm to broadcasters demonstrating that there *are* such negative effects, and that in some instances they are substantial.[83]

34. *Duplication and diversion*. There is substantial evidence in the record that local off-air programming is duplicated by cable systems' carriage of distant signals. NCTA, for example, presents a survey indicating that more than a third of the broadcast television signals carried by the "average" cable system are distant signals that might duplicate local broadcasters' programming.[84] NCTA also provides a case study suggesting that as many as 199 weekly hours of programming, representing 25 percent of the total programming provided via distant signal carriage on the cable system in question, were duplicative of programming available from local broadcasters in that system's market.[85] NCTA asserts that as many as 43 million viewers have duplicate programming available to them, a statistic cited by INTV as evidence of the "enormous breadth" of duplication.[86] Drawing on a study of the Washington, D.C., and Baltimore markets, CATA suggests that as much as 50 percent of programming on imported signals is duplicative.[87] Times Mirror estimates that duplicative programming on two of its systems accounts for 40 to 50 percent of its distant signal programming.[88] MPAA notes that KOKI-TV, Tulsa, Oklahoma has about 25 percent of its total syndicated program schedule duplicated, and that 80 percent of the syndicated programming of WHCT-TV in Hartford, CT is duplicated on cable systems in its service area.[89] Finally, TVX submits, as a result of four market studies, that more than 50 percent of each TVX station's programming in each market is duplicated.[90] No commenters present evidence suggesting that there is not substantial duplication.[91] Taken as a whole, the filings in this proceeding demonstrate beyond any reasonable doubt that a substantial percentage of the programming imported via distant signals simply duplicates already available programming.

35. While the comments basically agree on the fact of substantial duplication, there is much controversy as to whether broadcasters have been harmed by that duplication and whether viewers have been harmed or benefited.[92] Cable and other interests opposed to reinstituting syndicated exclusivity argue that independent broadcasters have thrived in the years since 1980.[93] Independent broadcasters, program suppliers, and others favoring the reinstitution of some form of syndicated exclusivity rules, in contrast, argue that broadcasters, advertisers, and program suppliers have suffered substantial economic harm, from the diversion of their audiences to imported duplicative signals, relative to what they would have experienced had syndicated exclusivity rules been in place.

36. It is clear from the evidence that substantial diversion occurs.[94] Estimates of viewer diversion range between 5 percent and 80 percent of the audiences broadcasters are able to achieve, with most of the estimates lying in the 25 to 45 percent range.[95] The strongest evidence of diversion is ratings information for programming that is simultaneously duplicated. Here, information contained in the record evidences as much as 50 percent of some programs' audiences being diverted to the simultaneously duplicating imported signal.[96] For example, TVX presents data for five markets in which broadcast stations experience same time duplication of syndicated programming, in some cases by more than one imported signal. Losses in Philadelphia range from 7-18% in ADI Households and 16-38% in Cable Households. Similar figures for Washington, D.C. are 2% and 6%; for Norfolk 13-14% and 20-22%; and for Raleigh, N.C., 5-11% and 11-20%. INTV reports that WTVZ in Norfolk, Va. experiences losses ranging from 47 -73% of audience for simultaneously aired childrens' programming. Small Market UHF Stations note that when KTKA goes head to head with an imported signal for MASH, the audience splits evenly between the two stations. Broadcaster Respondents demonstrate that WTXX in Waterbury, Ct. loses from 22-67% of its viewers when its programming is simultaneously duplicated. Arch Communications station WGBS in Philadelphia was able to achieve only a 55% share of the viewers of "Charles in Charge" when it was simultaneously available on the WPIX superstation via cable, and achieved only 60% in the case of "Voyagers", against WOR, another superstation. We recognize that duplication does not translate directly into diversion of audience from broadcasting. Some of the audience for duplicate programming on cable may represent audience over and above what the local broadcaster would be able to attract with that program even without cable duplication; a significant amount however, is undoubtedly diverted from the local broadcaster, particularly as the airing times for the programming become closer or, in the clearest case, simultaneous.

37. Arguing the other side, NCTA presents a case study of the Boston market showing that local station ratings for syndicated programs are higher for those programs that are duplicated than for those programs that are not.[97] While narrowly true, this argument is misleading. These results starkly reflect the fact that duplication is much more probable for popular programs that are particularly

likely to draw large audiences, with or without duplication, than it is for less popular programs. This tendency to import the most popular programs maximizes the economic damage done by virtue of duplication. This is borne out by MPAA's reply comments, which show that, despite their strong absolute ratings, programs that are duplicated in the Boston market achieve less than 80 percent of the ratings they achieve nationwide, whereas programs that are not duplicated in the Boston market achieve a rating five percent higher in Boston than they do nationwide.[98] In addition, INTV provides ratings data for 27 markets that indicate the extent to which duplicative superstation programming garners significant ratings. In some markets the imported signal earns ratings in the 4-6 range.[99] MPAA, in its comments, demonstrates that the percentage of superstation viewing of popular syndicated programs ranges as high as 44% for some programs, and averages as high as 17% in 6 major markets.[100]

38. NCTA also argues that in some cases distant signals are available off-the-air in the local market and that therefore not all diversion should be attributed to cable. However, they provide no quantitative assessment of this phenomenon, and we are unable to give it much weight in the absence of any evidence that it is important. In general, we note that, for the most part, signals defined as distant are *not* in fact available off the air and therefore are likely to be of little consequence in identifying the determinants of diversion.[101] Finally, NCTA notes certain factual errors in the comments of MPAA and INTV.[102] We have carefully examined these errors and conclude that they do not substantially change the picture these commenters have presented.[103]

39. We believe that those who would like us to restore syndicated exclusivity have made a good case that there has been substantial diversion.[104] As we have just noted, most of the audience for programs appearing simultaneously on cable and over the air locally represents a diversion from the audience of the local broadcaster; and broadcasters have provided a number of examples of same-time duplication and diversion.[105] In addition, the quantity of non-simultaneous duplication documented in the record in this proceeding, taken as a whole, presents compelling evidence that substantial diversion is taking place.

40. As to the quantitative importance of this harm, advertisers will generally, depending on audience demographics, be willing to pay more to advertise on broadcast programming which attracts a large audience. Conversely, as audiences are diverted from that programming, advertisers will pay less. INTV presents a study by the Butterfield Communications Group that takes the INTV estimates of audience diversion measured in ratings points and translates them into dollar losses.[106] These range from under $5000 per year for a bartered children's show to almost $1 million for "Facts of Life" in the San Diego market. NCTA replies that the study is flawed because it assumes too high an audience diversion factor and therefore overstates the ratings the program would achieve if it were to be shown exclusively by the local broadcaster.[107] Although the exact dollar costs of diversion estimated in the Butterfield study are subject to some margin of error, as is typical of studies of this kind, we agree with its overall contention that broadcasters have demonstrated that they experience losses from diversion.

41. Diversion imposes economic harm on local broadcasters that is the result of inequitable competitive rules rather than an inability to provide a good service responsive to viewers' wishes.[108] A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters. Nor are the broadcasters of distant signals likely to gain when they are retransmitted on a distant cable system, unless they are able to achieve superstation status and begin to attract national and regional advertising. Generally, local advertisers will pay little or nothing for the audiences that view them on cable in distant markets; consequently, program suppliers will not receive direct payments from broadcasters commensurate with the true size of their audience.

42. The main importance of evidence on duplication and diversion to this proceeding is *not* that particular broadcasters are economically disadvantaged thereby, although this will in general be true, and is of course viewed as a problem by the broadcasters. Rather, it is that broadcasters suffer diversion when they choose to exhibit programming that is particularly demanded by viewers. Such programming is the most likely to be duplicated, simply because popular programming, by definition, will be bought by stations in virtually all markets, many of whom will be imported into distant markets. Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters -- they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rule. Firms that choose to exhibit programming on an enforceable exclusive basis (*e.g.*, cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

43. As we noted above, when the Commission repealed the syndicated exclusivity rules in 1980, it noted that because of projected population and economic growth, any decline in advertising revenues received by local broadcasting stations as a result of diversion would likely be offset in whole or in part by overall growth in advertising expenditures. An analysis of advertising expenditures since that time, unfortunately, indicates that this prediction was somewhat inaccurate. The Commission did not, in 1980, fully anticipate the increase in the number of competitors to local broadcasting stations which has occurred since that date. Foremost among these competitors is cable television. Advertising on cable TV, also, according to a recent estimate by Paul Kagan Associates, has risen substantially. In 1987 local and national advertising on cable generated almost $1 billion in revenues.[109] While some of the advertising on cable may represent advertising that has not previously aired on local television stations, some fraction of it undoubtedly would have been placed on local stations if it had not been placed on the cable system.[110] The essential point here is that both broad-

casters and cable systems compete for the same advertising dollars, and use the same programming tools in doing so. Because this development was not anticipated by the 1980 Commission, we can fairly conclude that the emergence of cable as a competitor for local, as well as national, advertising casts doubt on the predictions made by the Commission in 1980 concerning advertising revenues available to television stations.

44. Finally, the 1980 Report found in its cost analysis that program supply should not be affected, in the short term, by the lack of syndicated exclusivity. Many commenters have documented the strong growth in syndicated programming that has taken place in recent years and some have provided examples where the lack of syndicated exclusivity has kept down the price broadcasters have been willing to pay for such programs.[111] No one, however, has provided evidence regarding the impact of the rescinding of syndicated exclusivity rules on the long run supply of syndicated programming. We note that as a matter of basic economics, the supply of programming will be less than it would otherwise be when the price suppliers can expect to receive is less than *it* would otherwise be, but it is an impossible task to identify the programs that people have not created because they lack the incentives syndicated exclusivity would provide. We are, therefore, no longer prepared to conclude, as we did in 1980, that the impact of repealing syndicated exclusivity rules on program supply would be small; we believe instead that, while that impact cannot be precisely ascertained, it could be quite significant. The consequence for broadcasters and viewers alike from any such effects on incentives to produce original cable programming, and real diversity for viewers that may occur are clearly harmful.[112]

45. *Benefits of No Syndicated Exclusivity.* In 1980, the Commission perceived the benefits to viewers from repealing the syndex rules in terms of increased program diversity through time and episode diversity, to outweigh any negative effects on broadcasters' revenues and program supply. A major argument for allowing the importation of duplicative programming was that it added to viewers' choices with respect to time of viewing or additional episodes.[113] Some consumer benefit may indeed arise in cases where viewers value the time or episode diversity afforded by the importation of distant signals. Some commenters argue, however, that consumers have been poorly served by cable operators who have relied excessively on distant signals for their programming rather than developing the original programming alternatives that cable can provide.[114] They argue that such duplication does not provide the true diversity in programming that cable has the capacity to provide.[115] Nevertheless, cable operators argue at length that time and episode diversity remain important to viewers and that cable subscribers frequently become patrons in part so that they can enjoy these options. Survey results and affidavits to this effect have been submitted by parties opposing the reimposition of syndicated exclusivity.[116] Cable operators also argue that viewers benefit from the additional news and public affairs that a distant station may make available to them, and that syndicated exclusivity will deny them access to this programming by forcing cable operators to drop distant signals that contain an overabundance of duplicative syndicated programming.

46. While some viewers undoubtedly value time and episode diversity, any such diversity benefits should, in principle, be weighed in some manner against the losses in true program variety that result from the "rule of reruns" that is implicit in extensive duplication, in order to determine the net increase in diversity. Further, to the extent cable subscribers do value a distant station highly, whether for news, time diversity, or some other reason, the cable operator has an incentive to overcome, either by negotiation, or the insertion of substitute programming, any obstacles that a local broadcaster's purchase of exclusivity may pose. Syndicated exclusivity rules, by requiring the cable operator to consider all the alternatives explicitly, increase the likelihood that the cable operator's choice in this matter reflects the value placed on distant duplicative signals by his subscribers.

47. Moreover, the increasing availability of VCRs reduces the need to achieve time diversity through cable's importation of distant signals.[117] The rapid increase in VCR penetration, especially in cable households, was completely unanticipated in 1980 when the Commission put a heavy weight on the advantages of time diversity that cable transmission of duplicate programming could provide. The ability to increase time diversity by recording television programming for later viewing has grown significantly since the Commission studied these issues in 1979. At that time, only about one and one half percent of TV households had VCRs.[118] Today, VCR penetration has grown to 58.1% of TV households and is even higher for households that subscribe to cable.[119] Importantly, time diversity in viewing obtained by the use of a VCR can be planned and made to fit the viewer's convenience, while reliance on duplicative imported signals may only fortuitously meet such needs.[120] Second, we note that in 1980 there were far fewer alternatives to broadcast signals than there are today. For that reason alone, time diversity is likely to be of less importance today than it was in 1980. Therefore, we have greatly reduced the weight we attach to any off-the-air time diversity benefits that duplicative signals may provide. However, even under syndicated exclusivity rules, time and episode diversity will be provided if it is valuable to consumers. First, to the extent viewers in a market value such diversity, the local broadcaster will seek the right to carry more than one episode per day. Second, to the extent cable subscribers value such diversity, cable operators may negotiate with the local broadcaster to forebear from enforcement of his syndicated exclusivity rights, thus allowing importation of the duplicating programming.[121] Reimposition of syndicated exclusivity rules will simply subject the issue of time and episode diversity to a market test. If broadcast or cable viewers value such diversity, the market will work to provide it.

48. In summary, we find ample evidence in the record that the cable and broadcast industries have grown in ways quite different from what we expected when we rescinded syndicated exclusivity rules in 1980. As a result, the costs of no syndicated exclusivity protection to broadcasters and program suppliers in terms of lost revenues, and the public in terms of foregone program diversity, are far greater than anticipated in 1980, while the benefit to the public -- time and episode diversity -- can be satisfied by other methods. Even using the 1980 cost-benefit analysis, we must find that the benefits of syndicated exclusivity outweigh its associated costs.

2. *The Purpose and Function of Program Exclusivity*

49. Given the strong evidence that cable has become a vigorous and substantial competitor in the television marketplace, we can find no economic justification for denying broadcasters of syndicated programs the same rights to program exclusivity that both cable and broadcast networks already enjoy. Virtually every commenter supporting exclusivity rules attests to the critical importance of exclusivity as a competitive strategy or tool that should be available. Broadcasters, cablecasters and other delivery media must be able to differentiate their product from that of others if they are to attract and maintain an audience. The importance of exclusivity has also been frequently highlighted in the trade press--both for broadcasters and cable operators.[122]

50. More importantly, the limitations our current rules impose on broadcasters prevent television viewers from getting the best possible mix of programs across different types of video outlets. That is, some programs that broadcasters could acquire if they could enforce exclusivity are currently likely to be unobtainable. Such programs are provided by other outlets, or perhaps not at all. As discussed more fully below, because local viewers may be diverted to distant stations, the ability of local advertisers as a group to make the best use of all available advertising media is reduced. Thus, diversion and the failure of local advertisers to value distant viewers reduces the market value of syndicated programs. As a consequence, suppliers of syndicated programs do not produce as rich and diverse a mix of programs as they would produce if the local broadcasters who bought their programs had the same rights to enforce exclusive contracts that cable and broadcast networks already enjoy.[123] Further, given broadcasting's greater household penetration in local markets and its consequent advantage over cable as an advertiser-based medium, it appears likely that broadcasters and their viewers might well be particularly harmed by the current, reduced incentives to produce programming intended to be funded by advertiser support. Ultimately, and in a variety of ways, the television viewer, whose options are reduced, suffers as a result of the absence of exclusivity.

51. The restoration of syndicated exclusivity protection is also consistent with our policy of relying on competition, whenever feasible, to accomplish our goals under the Communications Act.[124] Competition is generally far more reliable than regulation for fostering fair and efficient use of the means of mass communication.[125] We believe that as long as those conditions are met and we can also continue to meet all of our responsibilities under the Communications Act, we should not favor one delivery mode over another. To do so may predetermine the competitive outcome, and eliminate any presumption that the outcome that occurs is the one most beneficial to society.[126] Similarly, in considering the competitive relationship between broadcast and non-broadcast media, we believe that the public interest is enhanced by promoting a framework that interferes as little as possible with market incentives to meet viewer preferences. The fundamental reason is that this approach will lead to better service to the public. As discussed further below, syndicated exclusivity rules should be part of such a pro-competitive regulatory framework.

52. *Exclusivity as Competitive Tool.* Commenters opposed to restoring syndicated exclusivity, including every cable and superstation interest, but most notably NCTA, argued that syndicated exclusivity is harmful to the interests of viewers.[127] NCTA argues that reimposition of syndicated exclusivity "would cause millions of cable subscribers to lose access to programming shown on distant stations, and might very well cause subscribers to lose access to the stations altogether."[128] Other commenters similarly claim that massive disruptions to local broadcasters are bound to occur,[129] while Turner charges that the rules "would destroy the world as we know it."[130] Similarly, by repealing syndicated exclusivity in 1980, the Commission mistakenly cast the argument in terms of whether broadcasters could survive in an environment in which they could not enforce exclusive contracts. Perhaps they can, but the proper question is not whether broadcasters can survive. The proper question is: how does the presence or absence of syndicated exclusivity affect the the viability and strength of competition, and through this, achieve various consumer benefits, including program choice?

53. When examining the value of exclusivity as a competitive tool in the distribution of video programming, we must first consider the nature of the video programming market. Broadcast signals belong to a class of goods economists call "public goods," an essential characteristic of which is that enjoyment of the good by one person does not reduce the value of the good to another person.[131] The Commission's judgment in 1980 was that the syndicated exclusivity rules made consumers worse off by violating a basic efficiency criterion of modern welfare economics, namely, that public goods, like all other goods, should be priced at their cost. Because consumers can view broadcast signals at no marginal cost to the broadcaster, this efficiency criterion would lead to the conclusion that the signals should be distributed as widely as possible at no cost. The Commission thus concluded that the syndicated exclusivity rules should be repealed. As most economists recognize, however, the essential public policy dilemma in pricing public goods in order to achieve efficient consumption is that there would be no incentive to produce and distribute them in a private enterprise economy if a zero price were charged.[132] Production and distribution of programming require the use of scarce resources that could be used for other purposes, even if viewing does not. Thus, the conditions yielding optimal consumption of programming inherently conflict with those yielding optimal production.

54. In order for television programming to be produced, program producers and distributors must be compensated in such a way that they will have incentives to produce the amount and types of programming that viewers desire. Various techniques have been used to compensate program producers. Over-the-air subscription television and cable television, particularly pay-per-view systems, allow viewers to pay for the programs they want. These approaches more accurately reflect audiences' tastes, but they restrict viewing below the "efficient" level because a price is charged.[133] Advertiser support provides programs at zero price to the viewer, but uses imperfect audience measurement techniques to determine audience preferences. It also results in underinvestment in programming because advertisers value viewers' exposure to commercials less than the viewers value programming. In some countries the government chooses programming and finances its production with a tax on television receivers or even from general revenues. Again, viewing of existing programs is priced efficiently, but viewers have still less influence on the programming that is produced than they have with advertiser-supported or pay television.[134]

55. Clearly, none of these outcomes is ideal. The market imperfection created by a public good inherently requires balancing of the conflicting requirements of efficient production and efficient consumption. None of the comments in this proceeding directly addresses this conflict in these terms; but, as we demonstrate in this *Order*, the absence of syndicated exclusivity rules both hurts the supply of programs and unfairly handicaps competition to meet viewers' preferences in the distribution of existing programming.

56. *Effects on Program Supply*. Program suppliers, like other business people, respond to incentives. The greater the total number of programs and the quality and diversity of programs that are produced, the greater are the financial incentives facing program suppliers; and these incentives are greater with syndicated exclusivity rules than they are without them.

57. Incentives to develop new programs are greatest when program suppliers are able to sell their programs wherever there are viewers (or advertisers) willing to pay for them. Moreover, price information from all relevant markets is needed to guide program suppliers in their efforts to develop the kinds of programs viewers most want to see, as well as to decide how best to reach them. Without syndicated exclusivity rules, program suppliers are likely to receive less than the full market value of programs broadcast on distant signals that are retransmitted by cable, and therefore will not get good price information about the value of such programs to cable viewers.

58. The reason, explained below, is that viewers are diverted from the broadcasters with whom the program suppliers have contracted for exhibition. The revenues earned by the producer of a program depend upon the advertising revenue the broadcaster of the program is able to garner on the basis of the program's attractiveness to viewers. Duplication of programming through cable retransmission of distant signals breaks this link between the attractiveness of the program to viewers and the amount the program producer gets paid. When a cable operator in market B retransmits the signal of a broadcaster in distant market A, the total audience for the program may even grow, because there will be some new viewers to supplement the audience that has simply been diverted from local broadcaster B. As explained below this audience growth will not, however, translate into greater revenues for the program producer; it will be more likely to result in reduced revenues.

59. This reduction in revenues will occur because the loss of audience by broadcaster B will reduce the amount it is profitably able to pay for the program, while at the same time, advertisers in distant market A will attach little importance to the newly-attracted viewers in local market B. The result is too small an increase in revenues from distant broadcaster A to offset the loss of revenue from local broadcaster B.[135] Thus, program suppliers face reduced incentives to expand and improve the supply of programming under our current rules. With syndicated exclusivity, however, cable operators will be able to duplicate locally available programming only if they are willing to pay local broadcasters for the right to do so. In those situations where consumers value such duplication cable operators will have an incentive to enter into such arrangements with local broadcasters; program producers, in turn, should be able to charge local broadcasters a fee that reflects both advertising revenue and payments from cable systems for duplication rights, and will receive market signals that reflect the demands of all, not just some, viewers.

60. *Effects on Competition*. As already noted, all commenters agree that the ability to enter into exclusive contracts is a widely used competitive tool that is important to program suppliers, cable operators, and broadcasters.[136] And, as just discussed in the previous section, the program supplier is interested in reaching as large an audience as possible with its program, as long as increasing the size of the audience increases the amount the supplier will be paid for the program. By granting an exhibitor the exclusive right to show a particular program in its market, the program supplier maximizes the incentives of the exhibitor to promote the program and its ability to compete with other exhibitors. Any additional audience generated by the promotional efforts of an exhibitor translates into larger revenues for the exhibitor and larger payments to the program supplier.[137]

61. Apart from its direct effect on station revenues and the ability to obtain programming, program exclusivity may have a further value to broadcasters if it allows them to create a distinctive public image in order to attract viewers. For example, exclusivity may allow the broadcaster to acquire a reputation as the only source of certain valued types of programming, which may alert viewers to the general attractiveness of the broadcaster's whole range of programming selections.[138]

62. When the same program a broadcaster is showing is available via cable transmission of a duplicative signal, the broadcaster will attract a smaller audience, reducing the amount of advertising revenue it can garner and, as already noted, reducing the amount it will be willing to pay for the program. In addition, however, because some of the broadcaster's promotional effort is likely to attract viewers to the cable transmission rather than to its own broadcast, the broadcaster will not invest as much in promotion as it would if it were able to capture the full benefits of its promotional expenditure.[139] Networks and cable operators, in contrast, are able under current rules to negotiate exclusive contracts; and they do so regularly. Thus, if cable operators served the identical market, they would be able regularly to outbid independent broadcasters for desirable programming. Of course, their markets do not overlap perfectly; independent broadcasters have a distinctive place in the market that keeps them from being entirely foreclosed from competing for programming.[140] Nevertheless, their inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way.

63. Moreover, in the absence of must carry rules, the ability to obtain exclusive rights to programming may be an important tool in winning cable carriage. Because exclusive programming makes a program service more attractive to viewers, it will also be more attractive to the cable operator, who has an incentive to provide his customers with the most desirable programming in order to increase subscribership.

64. When there is a diverse set of program sources and outlets, as there increasingly is in the current television marketplace, the net effect of allowing exclusive arrange-

ments is to increase the kinds of competition and program diversity that can serve the interest of viewers.[141] For example, the emergence of Fox television as a programming service that can compete effectively with the 3 networks depends upon the expectation that cable operators will not destroy Fox's affiliates' programming exclusivity by carrying imported Fox programming distributed by a satellite carrier. A broadcaster will find it profitable to sign an exclusive contract only for programs that he will be able to promote effectively, and the broadcaster best able to attract viewers will be in a position to pay the most for that exclusivity. Competition among program suppliers ensures that exclusive contracts will be sought only for programs that will benefit from the extra promotion exclusivity allows. Naturally, many of these will be programs with substantial mass appeal, but some may also be programs that would not be produced or broadcast at all without the protection afforded by exclusivity. As long as there is reasonable competition among suppliers and distributors, exclusivity is a competitive tool that fosters the efficient channelling of programming to its most appropriate outlets, thereby maximizing the extent and diversity of programming available to viewers.[142] In this context the antitrust laws are the appropriate vehicle for dealing with those relatively rare situations in which exclusivity can be used to hinder competition.

65. We also take cognizance of the fact that broadcasting has greater household penetration than cable in most local markets.[143] With the restoration of their ability to contract for exclusive exhibition rights, broadcasters, therefore, will again be able to realize any inherent efficiencies they may possess *vis a vis* cable as an advertiser-based medium. Thus, if availability of exclusivity for broadcasters fosters more production, especially of programming targeted for distribution by advertiser-supported media,[144] then broadcasters and their viewers could be the primary or greatest beneficiaries. This may be particularly beneficial to viewers in the case of those program suppliers producing primarily for the advertiser supported market.

66. As a result of our analysis here, and our review of the record evidence in this proceeding, we conclude in this *Order* that exclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting. Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts.[145]

67. *Accomplishment of Statutory Goals.* One good indicator of whether a policy enhances the objective of using competition to carry out the Commission's goals under the Communications Act is whether that policy increases the supply and diversity of programming demanded by viewers. By this standard, the removal of restrictions on the number of distant signals a cable station could carry was a desirable audience-expanding policy, even though it may have had as a side effect a diversion of audience from broadcasters to cable. Hitherto unavailable programming became available to viewers for the first time. New technologies that permit low-cost retransmission of distant signals containing new program options for viewers also represent a clear benefit to those viewers, even though they also cause diversion of audience from existing broadcasters. However, when "real" program alternatives are being offered, such diversion should only take place in those cases where the programming offered via transmission of distant signals is more valuable to viewers than the programming offered by local broadcasters. In other words, any diversion of audience from broadcasters to cable is an important aspect of the consumer-welfare-enhancing effects of expanding the availability of programming outlets.

68. Unfortunately, the positive effects of removing restrictions on distant-signal carriage were weakened by the simultaneous removal of syndicated exclusivity. By eliminating the ability of broadcasters to secure exclusive rights to syndicated programs, the removal of syndicated exclusivity lessened the ability of independent broadcasters to compete for the best programming and hence reduced their ability to meet their viewers' demands.[146] Thus, rather than expanding the richness and diversity of programs available to viewers, as the elimination of distant signal limitations clearly did, the elimination of syndicated exclusivity protection increased the likelihood that programming less valued by viewers would be substituted for more highly valued programming.[147] In the absence of enforceable syndicated exclusivity rules, no objective market test can exist to indicate the value viewers place on the duplicative programming they are receiving.

69. Although cable systems pay compulsory license fees when they carry distant signals, these fees bear no direct relationship to the value of specific programs carried on specific distant signals. Thus, distant stations will be carried as long as their value to the cable operator exceeds the compulsory license fee, even if the value of these distant signals to viewers is less than the value of the alternative programs that cablecasters would carry if broadcasters could exercise exclusive rights, so that cable operators would have to negotiate to obtain the right to show duplicative programming.

70. Consider, for example, a syndicator especially skilled at developing programs that independent stations would find useful in establishing a competitive position in their markets. If some of the stations to which the syndicator would sell the program are also carried by cable systems, other stations will pay less than they would if there were no risk of audience diversion;[148] and it is possible that the difference between what stations would pay if they could enforce exclusivity and what they would pay if they could not is the difference between the syndicator's willingness to offer the program and his deciding that it is too risky a project to undertake.[149] Such effects operate directly in the case of first run syndication product, but also indirectly on programming first offered to networks that is expected eventually to move into syndication.

71. Thus, the absence of syndicated exclusivity can create a process in which the inability of broadcasters or syndicated program suppliers to capture the full value of programs tends to cause a decline in the quality and diversity of syndicated programs available to broadcasters, which in turn reduces the quality and diversity of the programs that are available to be imported via distant signal retransmission. Consumer welfare is reduced in this case because less valued programming crowds out more valued programming and viewers are subject to a "rule of re-runs" as a direct result of the absence of syndicated exclusivity. Moreover, we don't optimize the mix of programs delivered across media, *e.g.*, local broadcast, cable, and so forth.

72. It is logically possible that, despite the perverse incentives created by artificial restrictions on the ability of broadcasters to compete for syndicated programs, viewers do indeed value the existing mix of programs more than any other mix that might be produced and that there are no new or different programs that they would value more highly than the existing programming on the distant signals and local stations they are now watching. It is much more likely, however, that the reimposition of syndicated exclusivity would lead to the development of new programs to take the place of those for which broadcasters enforce exclusivity. The central--and critical--point here is that these programming choices would be made in response to viewers' preferences in a television marketplace with as full and fair competition as possible. The reinstituting of syndicated exclusivity, as a part of our exclusivity rules, is an important element in such a pro-competitive policy.

73. The Commission, pursuant to Section 307(b) of the Communications Act, has been charged with the responsibility of developing an orderly system of local broadcasting.[150] Our country has made a substantial investment in free, local, over-the-air service that has and continues substantially to promote the public interest. From a regulatory standpoint, broadcasters are governed by unique regulatory mechanisms that are designed to ensure they will serve their communities of license. In short, the Communications Act and our regulations have held broadcasters to a standard of operating in the public interest, convenience and necessity, with obligations to serve their local communities.

74. In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license. Restoration of our syndicated exclusivity rules will provide more balance to the marketplace and assist broadcasters in meeting the needs of the communities they are licensed to serve.

75. Our analysis demonstrates that syndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming.

76. *Costs of Reimposition.* The costs involved in any reimposition of syndicated exclusivity rules fall into two categories: Near-term disruption of cable subscriber viewing patterns and costs of compliance which will be incurred by cable operators, including costs of equipment, substitute programming and consumer education.

77. We believe that these charges are substantially overstated for several reasons. First, these commenters assume that broadcasters will choose to purchase, and that syndicators will choose to sell to them, syndicated exclusivity in each and every instance. When syndicated product is distributed, however, this is simply one of at least four options available to the distributors.[151] Certainly there will be instances in which a distributor chooses to sell, and local broadcasters choose to buy, programming with syndicated exclusivity protection. In that event, the distributor may choose to refrain from selling to the superstations at all.[152] Second, the distributor may choose to sell to both local broadcasters and superstations, on a nonexclusive basis.[153] Third, as discussed below, paras. 163-170, the distributor may choose to sell to a superstation and not local broadcasters. Finally, a distributor may sell programming on an exclusive basis to local broadcasters, and also sell it to a superstation. Only this fourth scenario may lead to deletions. It seems very likely, however, that a superstation will not purchase such programming unless, despite the potential for deletion, the programming has sufficient value to consumers in whatever markets remain. If the superstation is concerned that a cable system would discontinue its carriage, however, the superstation will have an incentive to purchase only, or at least primarily, programming not subject to deletion by the local systems.

78. But even if a superstation *does* choose to purchase programming that may be subject to deletion in certain markets, cable operators retain several options. The cable operator and the relevant broadcaster may find it in their mutual interest to work out an arrangement whereby the duplicative distant signal can be carried despite the local broadcaster's exclusivity right. If cable subscribers truly value the opportunity to view a particular syndicated program on a distant signal when it is also being shown by a local broadcaster, and if they value this opportunity more than any other program the cable operator might show, the cable operator has an incentive to pay the broadcaster for the right to duplicate its program and the broadcaster has an incentive to accept a payment rather than show the program exclusively as long as the payment more than makes up for any revenue declines as a result of diversion. In other words, when the overall market for the program would be larger if it were shown on a non-exclusive basis, and if both the cable operator and the broadcaster can make more money showing the program rather than showing the next best alternative programming, there is room for negotiation between the cable operator and the broadcaster to tap this larger market.[154] Thus, even with syndicated exclusivity rules in place, cable retains its full ability to compete with other industry groups for the use of exclusive programming.

79. Only in those instances where the imported signals are of little or no value would the cable system choose to drop them.[155] In such a case, replacement by a more highly valued signal is highly likely. Far from representing a loss in consumer welfare, this substitution of alternative programming for duplicative programming would represent a gain in consumer welfare, and in such a case, a gain in true program diversity. Now that there are more than 85 cable services, many of which may be picked up free by cable operators on an occasional use basis, there is no reason to believe, as may have been more true in 1980,

that there are no good alternatives to duplication. Such programming also may be obtained by "cherrypicking" from other broadcast signals. Or it may be obtained from nonbroadcast sources. As Tempo, one of the commenters opposing syndicated exclusivity has noted: "There are a myriad of cable-only satellite channels which occupy the secondary network status below CNN, ESPN, Nickelodeon and the like. These program sources, which are not universally carried, include the Tempo Companies as well as the Black Entertainment Network and numerous other cable channels. Programming from these channels could easily clear to be carried in place of the protected syndicated broadcast programs."[156]

80. Moreover, program supply services stand ready to provide substitute nationally cleared programming to eliminate any need for blackouts or holes. For instance, United Video has stated that it will provide programming, utilizing an alternate programming feed, to substitute when cable systems would otherwise delete the primary broadcast signal (WGN) delivered by United Video.[157] United Video envisions the provision of a centralized switching function so that substitution of the secondary feed would be done by United Video, thereby enabling cable system operators to continue providing subscribers with uninterrupted distant signal programing.

81. As stated above, cable operators will not be required to delete every duplicated program they choose to import, even if a local broadcaster holds exclusive rights to that program. A number of options are available to the operator, including negotiation to carry the program and substitution of other programming. Clearly, cable viewers need not be subjected to blank screens unless the cable operators chooses to disregard these options. We do recognize that such options may be pursued and effected only if cable opeators have sufficient time to negotiate with the local broadcaster or to obtain alternative programming. As discussed *infra* at paragraph 97, we have provided for such time.

82. Some commenters argue that, even if viewers are not faced with blacked out screens in the long run, the short-term disruption will cause great consumer dissatisfaction. In order to allow industry adjustments, so as to minimize viewer disruption, we have provided for a sufficient period of time within which the cable, broadcast, and program supply industries may accustom themselves to our new rules and anicipate any changes in programming distribution to their customers. *See infra* at paragraph 106. Thus, we believe that short-term viewer disruption will be minimal.

83. A number of commenters argue that syndicated exclusivity rules will impose substantial compliance costs on cable operators and, therefore, cable viewers.[158] Cable operators argue they will be required to buy equipment to perform program deletion and substitution, to hire new personnel to keep track of exclusivity requirements (including last minute schedule changes) and program the equipment. Moreover, some argue that expenses will rise because of the need to conduct consumer education programs to explain the reasons for program deletions and/or substitutions, and to handle the customer complaints from those viewers who will not understand the new programming environment. Estimates of the compliance costs extend over a wide range, and vary according to the number of channels subject to deletion and the number of headends in a system. Time estimates costs for blackout equipment ranging from about $5,500-7,500, while Centel argues that costs in two Michigan systems would be over $63,000 and "Coalition" posits costs ranging from $10,000 for manual equipment with $40,000 for labor to $100,000 for fully automated, computerized equipment. Cole-Raywid and United Video also present cost estimates on a per subscriber basis. Cole-Raywid presents estimates ranging from $.254 to .54 per subscriber per month while United Video claims first year costs of $4.98 per cable household and $3.98 thereafter. To this, cable commenters argue, must be added the costs of complaints, handling consumer education and the like. Finally, they argue that these costs, to the extent they are fixed, will fall particularly heavily on smaller cable systems, and have a disproportionately large effect on their subscribers.

84. While we recognize that cable systems will incur costs in complying with our rules, and in conducting their businesses in the new regulatory environment, we have concluded that the equipment and operating costs, as well as the likely amount of consumer confusion and complaints, have been substantially overstated by the parties opposed to the imposition of these rules. First, commenters fail to separate costs necessarily incurred to comply with our rules from costs that may be required in any case for other business purposes.[159] For example, equipment used for advertising insertions can also serve syndicated programming deletion or switching functions. Such equipment is already in place and being used by cable operators for ad insertions[160], local weather information insertion,[161] and compliance with existing sports blackout requirements. It is inappropriate to assign the entire cost of such equipment to our regulations. According to the Cable TV Advertising Bureau, approximately 2300 cable systems currently insert local advertising availabilities into satellite delivered programming.[162]

85. We recognize that many cable systems may not currently have appropriate switching equipment. However, the cost of equipment to switch automatically among various program sources has become quite reasonable. One manufacturer, for example, recently announced a seven day controller that can be programmed to turn on or off up to 100 times and feed eight individually programmed outputs. The cost of the controllers, which are standard stock items, begins at $850.[163] A survey conducted by INTV shows the price range of switching equipment to be between $1,000 and $12,000.[164] INTV believes that equipment in the lower end of this price range will be sufficient to handle the required switching to comply with syndicated exclusivity. United Video estimates such costs at $2,000. The same equipment may be used for compliance with our network nonduplication and sports blackout rules.[165] We also note that some cable systems already "mix and match" programming from several sources.[166] The technology for doing this is not only available, it is already in use. In many cases, therefore, additional costs of providing exclusivity protection to broadcasters of syndicated programming would be minimal, and in any event, do not appear to be prohibitively large for even smaller cable systems. Finally, equipment is likely to be in place for more than one year; it is therefore inappropriate to treat its (nonrecurring) cost as falling entirely in one year.

86. We do believe that the cable commenters make a valid point in their argument that the costs of obtaining such equipment fall more heavily on smaller systems, when examined on a per subscriber basis. As discussed more fully below, we intend to exempt systems serving fewer than 1,000 subscribers from the requirements of

syndicated exclusivity rules. These systems are not now subject to the network nonduplication or sports blackout rules, nor is it likely that these systems perform advertising insertions. Because such systems serve only 5.1% of all cable households, the per subscriber cost of compliance is clearly somewhat higher than for other systems. Systems serving fewer than 1,000 subscribers represent 60% (or about 5700) of all cable systems. Thus, we believe that approximately 1500 cable systems that may not currently have switching equipment will need to acquire some form of equipment.

87. An extensive report submitted by MPAA notes that cable industry estimates are based on the assumption that every cable system will perform, individually, and manually, at each head end, the deletion/substitution function. In fact, much of this could be done centrally by the uplinker, rather than each cable system, using electronic control and automated switching equipment. Central control (perhaps by the common carriers who provide superstations with their uplink) would require substantially less labor than decentralized approaches, as well as fairly modest equipment costs.[167] Other centralized control approaches might use the Videocipher II technology or auxiliary data channels.[168] According to Tempo,

> Every satellite distribution system has the capacity to implement a nationwide syndicated exclusivity program substitution network that would not only ensure exclusivity for the subject program but would also provide the program diversity not feasible through system-by-system negotiation and implementation. Southern Satellite as a nationwide satellite common carrier which addresses over twelve thousand cable systems serving forty-five million subscribers, has the capacity and capability of implementing syndicated exclusivity on a nationwide basis. Southern Satellite has the capability of program switching programmed for every cable television system in the United States having an earth satellite receiving station, not just those actually receiving WTBS.[169]

United Video has offered a detailed description of a centralized approach to switching. While this may not be operational immediately, we would anticipate its development in response to cable operator demand -- thus drawing compliance costs down even more.[170]

88. While cable systems may therefore be obliged to purchase some switching equipment, we believe such equipment may be had for a reasonable cost. Equipment cost may be amortized over a number of years and it may be used for nonregulatory revenue-producing functions such as ad insertion as well. In addition, we fully expect centralized switching to be developed in order to further compliance costs.

89. *Conclusion:* We conclude, based on the record, therefore, that despite what opponents to the rule would have us believe, reinstituting syndicated exclusivity protection does not preordain any particular programming outcome. There may be many syndicated programs for which the syndicator or the local broadcaster does not find it worthwhile to negotiate for exclusivity. There may be situations in which the broadcaster chooses not to exercise exclusivity for which he has negotiated. There may be situations in which cable operators pay broadcasters who have purchased exclusivity for the right to retransmit syndicated programs and there may be situations in which the cable operator substitutes alternative programming. The important point about competition with clearly defined property rights is that arrangements will differ with circumstances, but the arrangement that is reached in any particular circumstance is likely to be the one that best meets the demands of viewers. The restoration of syndicated exclusivity protection will enhance competition in the video marketplace by eliminating unfairness to broadcasters. It will increase incentives to supply the programs viewers want to see and it will encourage the development of a pattern of distribution that makes the best use of the particular advantages of different distribution outlets. It will encourage promotion of programming. Although cable operators may have to make some changes to the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by benefits. Specifically, television viewers generally will be exposed to richer and more diverse programming.

C. Rules

90. In this section we address the specific content of our amended program exclusivity rules. Many commenters have objected that the old rules, as they relate to syndicated exclusivity, were misunderstood, difficult to invoke or enforce, and complicated in form to the point of being baroque. We believe these criticisms of the specific form of the old rules are not without merit; therefore, the new regulations we are adopting constitute the simplest and most straightforward rules that will allow the marketplace for video programming to function evenhandedly, at low cost, and in a manner that is fully responsive to viewers. Our new rules are presented in Appendix B to this *Order*.

91. *Programming.* Our former rules distinguished among several categories of syndicated programming: off-network, first run syndicated, movies, non-series programs, etc.[171] Each category was subject to varying provisions, governing the scope of protection and the duration of exclusivity. We do not believe there is any public interest basis for this Commission to distinguish among the various classes of programs.[172] Each type of programming is to some degree a substitute for all the others, any one of which may at a particular time be an important element of a broadcast station's or cable system's competitive strategy.[173] We therefore treat all types of syndicated product as a unit, making no distinctions among them for this purpose. Nor will we distinguish among programs by age. Older programs or movies may well have substantial value to a broadcaster or cable system, and each competitor should be able to negotiate for whatever degree of exclusivity protection it deems desirable.

92. *Length of Protection.* Several commenters suggest that the term of program exclusivity should simply run with the contract the broadcaster has signed with the program supplier.[174] Our earlier rules placed a variety of time limits on the exercise of exclusivity, depending both on market size and type of programming. The apparent purpose of such limitations was to prevent programming from being locked-up or "warehoused" by broadcasters. Similarly, some commenters in this proceeding allege that broadcasters will "warehouse" programs for anti-competitive purposes, thereby injuring both viewers and the competitive process itself.[175] For such a strategy to be effective, however, the broadcaster would have to be able to limit alternative programming sources to competitors, something we find highly unlikely. Moreover, the fact that

there is competition in almost all broadcast markets means that the warehouser pays the entire cost of withholding product, while all of the competing broadcasters would benefit in the unlikely event that such a strategy resulted in higher advertising rates. In short, as with output restriction or other forms of attempted predation in competitive settings, this would in general be expensive and, ultimately, a fruitless tactic. In our Network Inquiry, the special staff concluded that "[b]ecause program supply is competitively structured and exhibits high entry rates, existing program suppliers will not be able to forestall new network entry by withholding programming. For the same reasons, it is unlikely that the existing dominant three networks will be able to adopt contractual arrangements with program suppliers that materially limit the ability of additional networks to obtain programming."[176] In particular, we do not regard so-called "block booking" practices as evidence that warehousing is likely to be a problem. Block booking mainly is a marketing device arising out of the need to reduce transactions costs between program suppliers, to enforce average pricing where there is substantial variation in quality within a block of programs or, possibly, to take advantage of the fact that different purchasers of product place differing relative values on the programs within a block. In none of these cases is block booking pursued for the purpose of warehousing as that term is used here.[177] We expressed a similar view of the likelihood of warehousing in our 1983 proceeding regarding our syndication and financial interest rules.[178] Because program suppliers normally charge a significant price for the programming they make available, failure by broadcasters to show such programming themselves, or to make it available to others, is likely to prove a very expensive anti-competitive tactic. We have also seen no evidence in the record in this proceeding or elsewhere that persuades us that warehousing is an anti-competitive problem requiring our attention. Therefore, we shall permit exclusivity to run for the length of time specified in the contract granting such exclusivity to the broadcaster.[179]

93. *Broadcast Station and Cable System Coverage.* The prior rules laid down separate sets of rules for broadcasters and cable operators in the top 50 markets, second 50 markets, and below the top 100 markets. The most extensive protection was provided in the top 50 markets, where the vast majority of programming revenues accrued. Broadcasters in the second 50 markets received less protection, and, below the top 100 markets, no protection whatsoever. It was this particular structure of protection that led the Commission in earlier proceedings to charge that the exclusivity rules were designed primarily to protect programmers. As we have made abundantly clear throughout this *Order*, however, our interest in this proceeding lies in promoting the equitable and efficient functioning of the video marketplace, particularly with respect to broadcast and cable, so as to maximize viewers' interests. Competition, especially with cable, is pervasive and vigorous in all broadcast markets, and exclusivity may well be as important a competitive tool in the medium and smaller markets, which generate only modest advertising revenues, as in the largest, where millions of dollars may be at stake. In short, the ability to purchase exclusive rights may be critically important to any broadcaster. Further, rules that also promote the availability of alternative programming may be especially important in smaller markets, where there are fewer broadcast outlets. We note also that in smaller markets, fewer stations exist to seek syndication exclusivity protection. Thus, the burden on most cable system of honoring exclusivity contracts, and of obtaining alternative programming, if that should prove necessary or desirable, should be more modest. For these reasons, we have decided that, the amended rules should apply to all syndicated programming covered by exclusivity contracts, whatever the size of the broadcast market.

94. *Cable system size.* A substantial number of cable commenters have urged us, if we adopt rules, to make an exemption for smaller cable systems.[180] Their primary concern is that for small systems, the fixed and operational costs of providing exclusivity protection will be large relative to the benefits to viewers in these markets. Commenters suggesting this exemption propose, variously, a cut-off ranging from 1,000 to 10,000 subscribers. Certain commenters representing broadcast interests state that a 1,000 subscriber cut off would be acceptable to them, although some note that any exemption should apply only to independent cable systems, not small units of MSO's. While we think that the cost estimates for compliance suggested by some commenters are substantially overstated, we nevertheless agree that an exemption should be adopted for very small cable systems. Although we expect that the compliance costs that cable systems must incur as a result of the extension of exclusivity protection to syndicated programming will not be large, any expenses will necessarily have a greater impact, on a per subscriber basis, on small systems.[181] Therefore, we will exempt systems serving fewer than 1,000 subscribers from compliance with these rules, just as they were exempt from our former rules.

95. *Parties entitled to exclusivity.* Some commenters argue that syndicated exclusivity should be invokable by either the broadcaster or the program supplier, based on whatever agreement the two parties reach with respect to this issue.[182] They express the fear that cable systems, in the absence of must carry rules, will threaten to withhold carriage from broadcasters who wish to exercise their exclusivity rights. No party, however, has offered convincing support for this position. However, a station's right to exercise its syndicated exclusivity rights will not depend on its carriage by the cable system. If broadcasters obtain exclusive rights to important programming in their market, they will be in a position to make themselves more attractive to cable systems. A cable system should have little incentive to drop a broadcast signal when it will nevertheless be required to honor that broadcaster's exclusivity rights, and by dropping the signal, lose programming valuable to the cable system's subscribers. We are also concerned that broadcasters be free to enter into mutually beneficial agreements with cable operators to permit showings of programming to which the broadcaster has previously acquired exclusive rights.[183] Allowing programming suppliers to exercise exclusive rights independently might well interfere with this process.[184] As noted throughout this *Order*, syndicated exclusivity is intended to put broadcasters on an equal footing with cable systems, not to enhance the ability of program suppliers to control distribution of their programming. We provide for only one exception to this general rule. A program supplier or syndicator may enforce exclusive rights to a program, against cable operators importing that program to markets in which the supplier or syndicator has not yet sold distribution rights, for a period of one year from the first sale of that program to any broadcast station in the U.S. The ability to enforce such rights will allow an orderly and efficient initial distribution of programming to

broadcasters throughout the country without any fear that the program will enter the market via distant signal before a contract agreement can be reached in the markets where negotiations are not yet concluded.

96. *Geographical Extent of Exclusivity.* Commenters have offered a number of suggestions with respect to the desirable extent of exclusivity. Some have suggested that no geographic limit should be imposed on exclusivity, on the ground that in competitive markets it would generally be uneconomic for a firm to purchase more exclusivity than it could effectively use. Others suggest making the limit co-extensive with our territorial exclusivity rule.[185] Still others suggest the Area of Dominant Influence (ADI), or even 50 miles surrounding all named communities in the station's ADI. Pending further exploration of these geographical issues as discussed below,[186] we have determined that the geographical limits of available syndicated exclusivity protection should be no greater than the territorial exclusivity purchased.[187] This limit is currently 35 miles (or the hyphenated market), and therefore a broadcaster currently has no reasonable expectation of exclusivity as against either broadcasting or cable, beyond that. In addition, where a cable system's viewers can receive, off the air, the signals of two or more broadcast stations, each of which has nominally exclusive exhibition rights in its area, neither station will be permitted to invoke syndicated exclusivity rights against the programming of the other, but either or both may invoke exclusivity against any other imported broadcast signal. Thus, a broadcaster cannot contract for exclusive rights when it has no reasonable expectation of exclusivity in any case. Moreover, this exception should temper considerably any adjustments that are required of cable operators and viewers as a result of these rules. Therefore, when a cable community unit falls, in whole or in part, within the grade B contour of a broadcast signal, or the signal is significantly viewed in that area, pursuant to 47 C.F.R. Section 76.54, the cable community unit cannot be required to delete the signal.

97. *Notification Issues.*[188] Commenters suggest a range of appropriate notification procedures. At one extreme is NAB's proposal that there be a simple one-time notification to cable systems by the broadcaster that it holds exclusive rights to a certain syndicated program.[189] Other proposals suggest increasingly elaborate procedures, requiring transfer of a considerable amount of information. The purpose of our rules is to assure that all competitors are able to bargain for and enforce reasonable syndicated program exclusivity, because we have concluded that such a framework will best serve viewers. We are concerned that our notification procedures be consistent with the achievement of efficient operations in both the broadcast and cable industries, and therefore, be no more burdensome on either party than is necessary.

98. We first consider the amount of advance notification that should be afforded to a cable operator before it may be required to delete a program for which a local broadcaster has obtained exclusive rights. As explained earlier, a cable operator against whom the exclusivity rules are invoked has three options. First, it may simply blank out the signal for the necessary period of time. Since this reduces the value of the signal to zero during this time period (and perhaps beyond), this is an unlikely response over the long term. Second, the cable operator may negotiate with the broadcaster and gain from it the right to carry the signal. We recognize, however, that some time may be required for such an agreement to be reached. Finally, the cable operator may substitute any alternative programming to which it has rights for the programming that is subject to deletion under the syndicated exclusivity rule. This third option necessitates two further steps: obtaining alternative programming and then promoting it to viewers. As we have already noted, it will be in viewers' interests, and consistent with our goal of assuring that the optimal amount of diversity in programming options is provided, if cable systems are able to obtain, and consumers are made aware of, new program offerings. To advance these objectives, cable systems must be able to prepare program guides and/or notify newspapers and general publications of their forthcoming schedules.[190]

99. Based on the foregoing considerations, it seems apparent that viewer interests will be served by allowing a reasonable period of notification before signals must be deleted. Broadcaster interests suggest essentially a one week notification, similar to that in the 1972 rules. Tempo suggests 60 days.[191] We have concluded that a longer period than that specified in our former rules would be desirable. A period of one week does not afford a cable operator a reasonable opportunity either to negotiate for possible carriage rights with the broadcaster or, if those negotiations are not successfully concluded, to obtain alternative offerings and make the public aware of them. Because a broadcaster will know what exclusivity it is obtaining as of the date it enters into a programming contract, we see no reason that this information should be withheld from the affected cable operator. We thus will require broadcasters to notify cable systems, within sixty days of entering into an exclusive contract. As broadcasters enter into program contracts up to two years prior to the commencement of their rights thereunder, such advance notification should give cable operators ample time to comply with our rules. In any event, however, we believe that cable operators should be afforded no less than sixty days advance notice prior to the time a broadcaster intends to exercise its exclusivity rights. A sixty day requirement should accommodate the normal program guide notification period, and foster cable operators' flexibility to make last minute adjustments in their schedules in response to competitive forces, newly available programming, or other factors. We will therefore require at least 60 calendar days notice of an intent to exercise exclusivity rights. We expect that this will accommodate normal planning practices in the cable and broadcast industries. We will require broadcasters to provide in their notification to cable operators the names of the series or specific programs to which the broadcaster holds syndicated exclusivity rights and the starting and ending dates of exclusivity protection. No other contract terms need be disclosed. Broadcasters need only provide notification once with respect to each programming contract, at the required time and prior to commencement of exclusivity. Notification may be made directly by the broadcaster or by an authorized agent, such as an information clearinghouse, at the broadcaster's option.

100. *Contract Terms.* In order to facilitate compliance by cable operators, we have determined to require that programming contracts contain certain language before broadcasters may avail themselves of our rules. At a minimum, contracts must specifically state that "the licensee shall, by the terms of this contract, be entitled to invoke protection against the duplication of programming imported under the Compulsory Copyright License, as provided in the FCC's syndicated exclusivity rules." Obviously, contracts

may go on to specify the scope of such protection in terms of the product to be protected, the duration of protection, etc. Upon request by the cable operator, the broadcaster must furnish the syndicated exclusivity provisions of the relevant programming contract, executed or otherwise attested to by the parties thereto.

101. *Regulatory Status of Existing Contracts.* In their comments, some broadcasters and program suppliers have urged us to make the rules applicable to all existing contracts containing syndicated exclusivity clauses. For example, MPAA urges that we *not* adopt a clause withholding exclusivity from those whose outstanding contracts contain exclusivity clauses, but were signed during the post-1980 period, during which effective syndicated exclusivity rights were unavailable. They reason that such a course would conflict with the Commission's support of freedom of contract, and thwart achievement of the important public interest benefits to be gained from allowing broadcasters to bargain for exclusivity. MPAA and INTV argue that, over the past eight years, some broadcasters have sought, bargained for, and paid for syndicated exclusivity rights, on the contingency that they might some day be enforceable. A provision limiting the rules' application to new contracts would nullify these provisions that were contracted for in good faith by the parties.[192] They note that no provision was made when the rules were repealed in 1980 for the fact that broadcasters had negotiated and paid for exclusive rights that would no longer be enforceable. Nevertheless, they argue, broadcasters continued actively to bargain for such rights on the possibility that they would again be enforceable if syndicated exclusivity were readopted by the Commission, or if Congress were to repeal the compulsory copyright license.[193] They further argue that throughout this period there was a reasonable basis for broadcasters to negotiate for exclusivity rights in the hope that enforceability would become possible. Thus, they claim, any new exclusivity rules should be fully applicable to all existing exclusive contracts. Finally, they note that if exclusivity is available only on a prospective basis, meaningful exclusivity will not be available generally until well into the 1990's, given the time lag between contract execution and program exhibition.

102. Cable interests, on the other hand, argue that broadcasters, until very recently, had no legitimate expectation that syndicated exclusivity rules might be adopted, so that broadcasters could not have meaningfully contracted for exclusive rights.[194] To allow enforcement of syndicated exclusivity for existing programming contracts, they argue, would confer an unwarranted windfall on broadcasters. In addition, cable and superstation interests stress that considerable disruption will occur if the bulk of syndicated programming now imported on distant signals were suddenly to become subject to syndicated exclusivity protection.[195]

103. Two distinct issues are raised here. The first is the extent to which already existing contracts provide for syndicated exclusivity protection. The second is when such provisions, should they be found to exist in certain contracts, become enforceable. Each issue is discussed in the following paragraphs.

104. *Exclusivity Determination in Existing Contracts.* We have concluded in this proceeding that giving broadcasters the right to contract for effective syndicated exclusivity rights is in the public interest. Therefore, we agree with broadcaster commenters that it would be inconsistent with the purposes of this proceeding to deny the enforcement of exclusivity rights that were intended to be a part of a program supply contract, and for which broadcasters bargained and paid. At the same time, we wish to be perfectly clear that we will not provide exclusivity protection to those who, for whatever reason, did not bargain for it. There are many thousands of contracts for programming in effect, some of which may have syndicated exclusivity clauses, some of which may not, and some which may be written in an ambiguous fashion. For contractual purposes, the essential element determining whether a contract contains a syndicated exclusivity clause is whether there has been a meeting of the minds to that effect. Only the contracting parties can know this, and it can be determined by others only through the parties' joint express and specific statement to that effect, or by the determination of a court in the event of later disagreement between the parties. We have determined to rely on the parties' understanding as to whether or not syndicated exclusivity protection is provided for in any outstanding contract. Clearly, parties entering into contracts dated on or after May 18, 1988, which contain the specific language set forth in paragraph 100 above will be able to enforce their syndicated exclusivity rights. In addition, where a contract already existing on the effective date of this *Order* contains a clear and specific reference to the licensee's authority to exercise exclusivity rights as to the specific programming against cable television broadcast signal carriage upon the contingency that the government reimposes syndicated exclusivity protection, that contract will become enforceable. A contract phrase specifying that "if the FCC adopts syndicated exclusivity rules, syndicated exclusivity applies" is an example of such a reference. We thus disagree with those who would characterize this action as "retroactively" creating syndicated exclusivity rights. By these rules we only give prospective effect to exclusivity arrangements that were already negotiated for and in existence on or before the effective date of this *Order*. Parties who did not obtain syndicated exclusivity rights prior to our action today will not gain such rights as a result of that action.

105. Broadcasters who believe an existing contract not containing such explicit language provides them with syndicated exclusivity protection, and who wish to invoke such protection, will be required to notify the program supplier that they believe they have enforceable syndicated exclusivity rights in their program contract, and would like to exercise those rights. If the program supplier agrees with the broadcaster, he may affirm, using the specific language provided in the rules, that the broadcaster has syndicated exclusivity rights to the programming in question. Alternatively, the broadcaster and the program supplier may amend the existing contract to provide syndicated exclusivity, in the form required by the rules. In either instance, we will regard the matter as settled for our purposes. Broadcasters may then exercise their exclusivity rights by giving proper notification, as outlined above, and, upon request by the cable operator, furnishing a copy of the writing pursuant to which they are claiming protection.

106. *Effective Dates.* For contracts entered into after the effective date of this *Order* our amended rules provide that exclusivity protection will become enforceable upon proper advance notice. Such protection will not become operative, however, until August 18, 1989, *see* 47 C.F.R. Section 1.4, so that cable operators and others will have sufficient time to comply with the requirements of this

Order. Similarily, broadcasters who have established, in either manner set forth above, that they possess enforceable exclusivity rights in pre-existing contracts shall not be entitled to actual protection until the later of (1) 60 days after such notification or (2) August 18, 1989. We believe that such a transition period will allow cable systems and others sufficient time to respond to the requirements placed upon them by syndicated exclusivity, in whatever manner they deem in their own best interest, and reduce or prevent sudden disruptions that might disserve viewers' interests. As previously discussed, cable systems must obtain switching equipment or make other arrangements in order to comply with the provisions of our amended rules. A one-year period should allow sufficient time for the purchase, installation and testing of new equipment, for the adaptation of existing equipment or for the possible creation, in certain circumstances, of centralized switching. In addition, this one year period should allow broadcasters to clarify or confirm the exclusivity provisions of existing contracts and to begin the use of the language required herein with regard to new contracts. We would expect that, as broadcasters do confirm their rights during this one-year period, they will provide prompt notice to cable operators in order to provide a smooth transition to the new regulatory regime.

107. Turner Broadcasting has argued that because of its special circumstances it should be insulated from any adverse impacts arising from adoption of syndicated exclusivity rules.[196] It argues that "retroactive reimposition" of such rules would cause Turner severe economic harm, since it has acquired rights to a substantial amount of syndicated programming at prices several times the local Atlanta rate. Turner further argues that for the last eight years it has been acquiring programming in reliance on the FCC's existing framework of rules (*e.g.*, no syndicated exclusivity rule).[197] We conclude that no equitable or public interest basis has been presented that is sufficient to outweigh the public interest in giving effect to our new rules after the 12 month transition period. In negotiating long-term contracts, parties who have not protected themselves through adequate contingencies assume the risk that circumstances may change. Turner has, throughout this period, had the option of negotiating for protection against exclusivity by purchasing explicit national (albeit nonexclusive) rights.[198] Turner notes that it has paid prices above the Atlanta rate for its programming.[199] If it believes it has, thereby, acquired such rights, the issue should be resolved, in the first instance, by the contracting parties. The procedures outlined and the time period provided in the previous paragraphs should afford Turner sufficient opportunity to determine the nature of its contractual rights to programming, and to take whatever actions it deems to be in its best interest. Therefore, we decline to adopt any special provisions in this *Order* for Turner.

108. *Other matters*. MPAA and Major League Baseball have urged us to formulate our rules to discourage the substitution of one distant signal program by another (cherrypicking).[200] MPAA argues that we should encourage the acquisition of original programming. Major League Baseball argues that permitted substitution would enhance cable's "unfair competitive advantage under the compulsory license" at the expense of program suppliers, including Major League Baseball, who will receive no benefit from syndicated exclusivity.[201] While the Commission is separately examining the continued wisdom of the cable compulsory license, our interest in this docket is solely in providing a marketplace environment, within the *current* copyright framework, through which consumers' demands for programming may be efficiently met. If consumers desire another distant program that may be imported in preference to original programming, we have no quarrel with that choice. Therefore, we will not discourage substitution. On the contrary, we note that the Copyright Act specifically addresses this issue. Section 111(f) of the Copyright Act, 17 U.S.C. Section 111(f), in defining the term "distant signal equivalent," provides that

> where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission . . . no value shall be assigned for the substituted or additional program.

The concept of distant signal equivalent, and the royalty payments flowing thereform, are based upon cable's utilization of an entire distant signal. (17 U.S.C. 111(f)(1976)) As our syndicated exclusivity regime may require the deletion of portions of such signals, unless we permit substitution, cable operators will be paying for full importation pursuant to the compulsory license without receiving the benefit thereof. Section 111(f) of the Copyright Act foresaw this eventuality and made provision therefor. We already specifically permit substitution when cable operators are required to delete programming pursuant to our sports blackout rule. Under our prior syndicated exclusivity rules, we also permitted substitution.[202] In order to allow cable systems the greatest flexibility in obtaining alternative programming, and easing cost of compliance, we have determined to permit substitution. Cable operators may substitute other distant signals because of our syndicated exclusivity rules. Such substituted program may be carried until its completion. We do *not* contemplate that cable systems will, or will even be able to, "cherrypick" distant programming in order to create a composite signal of sports or other product as a consequence of our decision herein. This would clearly lie outside the contemplation of our intent to permit only substitution.

109. MPAA has also urged the inclusion of a sunset provision for syndicated exclusivity protection should Congress enact legislation providing full copyright protection for syndicated programming.[203] We also sought comment on this question in our *Notice* in this proceeding. We have concluded that we will not enact such a provision, but will act on this matter if and when it becomes necessary to do so.[204]

III. NETWORK PROGRAMMING

110. In our *Notice* in this proceeding we observed that the network non-duplication rules,[205] like syndicated exclusivity rules, allow a network affiliate to prevent a cable system from simultaneously importing another affiliate network program signal into its market. Thus each affiliate is normally the exclusive distributor of network programming in its own market except where network affiliates' signals overlap.[206] Our analysis suggested that because the network programming material is identical, the rules actually protect the local advertising and the public service

announcements within and adjacent to network programming. They do not, however, allow the network to increase its revenues; nor was this their intent. [207] We suggested that broadcasters who are network affiliates should have the same right to contract for exclusivity with respect to their principal programming as other broadcasters. We argued that many of the same policy concerns about fair competition, and enhancing diversity of programming and efficient distribution raised with respect to syndicated programming apply here as well. Finally, we observed that the difference between the network non-duplication rules and the former syndicated exclusivity rules appear to be one more of degree than of kind. Both simply permit the broadcaster to negotiate for and enforce exclusivity provisions in their program contracts.[208]

111. *Background*. We have recounted the history of the exclusivity rules, which prior to 1972 subsumed network non-duplication rules, in earlier sections of this *Order*.[209] We shall not repeat that history here. By 1972, the non-duplication protection afforded to network programming had been reduced from a 30-day protection (*i.e.*,15 days before to 15 days after exhibition) to same-day protection. In our 1972 *Order* we further reduced the protection, requiring cable systems to refrain only from simultaneous duplication of network programming.[210] On reconsideration, however, same-day protection was reinstituted for broadcast stations located in the Mountain Time Zone.[211] Same day protection was finally eliminated for Mountain Time Zone stations in 1975.[212] Reasoning that even in the Mountain Time Zone the simultaneous-only rule afforded most stations about the same degree of protection as the day-long rule, we adopted a single nationwide standard of protection.[213] The overall theory appears to have been one of protection against time zone shifts, and because such shifting was rare, no more stringent degree of regulation was necessary. The *1980 Report and Order* eliminating the distant signal carriage and syndicated exclusivity rules did not change the network non-duplication rules in any way. While making little distinction between the network non-duplication rules and the syndicated exclusivity rules, the Notice of Proposed Rule Making had simply stated that the network non-duplication rules "may warrant review on their own merits but since different considerations are involved we believe it administratively efficient to consider these rules [referring to the network nonduplication, mandatory carriage and sports blackout rules] separately."[214] Thus, the rules have remained unchanged since 1975.

112. In the *Notice*, we sought comment on how, if at all, the network non-duplication rules should be changed. We sought comment on whether we should return to same-day protection, who should be able to invoke the rule, whether the network is in essentially the same position as the copyright holder, whether there might be instances where the interests of the network and the station in invoking the rule might diverge, and whether a network's invoking the rule might cause the public harm. We asked whether one rule might suffice for both network and syndicated product, and whether changes in our waiver or other procedures might be warranted.

113. *Summary of Comments*. We have received comments and/or reply comments from thirteen parties, nine of whom favor changes in our rules that would strengthen network non-duplication protection. NBC and CBS Affiliates, among others, argue that protecting a broadcaster's exclusivity in its local market is essential to the network-affiliate relationship, and hence to networking itself.[215] NBC also agrees with our *Notice* that the rule really protects the local station's advertising revenues.[216] Commenters note that there has been no change over time in this rationale for protection. Virtually all those in favor of strengthening network non-duplication protection, however, note that circumstances have changed drastically in recent years. While conceding that, in the past, the Commission may well have been correct that simultaneous protection sufficed to permit the network-affiliate relation to function, they note that satellite distribution of selected affiliates' signals now renders this protection insufficient.[217] Wholesale importation of signals across time zones is now possible, transforming distant network stations into competitive program origination services, but with the same programs. Same day protection, they argue, is now necessary. NBC also points out that no Copyright Royalty Tribunal fee is paid for network distant signals, since a payment mechanism for the network exists even if the signals are duplicated.[218] They note in particular that the basis for not including their signals in the copyright royalty system was that the copyright owner contracts with the broadcaster on the basis of the programming in question reaching all markets throughout the United States simultaneously. As circumstances have changed, this is no longer the case. CBS and others also argue that the desirability of preserving the efficiencies of the network-affiliate system outweighs any time diversity concerns, which in any event are substantially ameliorated by increasing VCR penetration.[219]

114. Commenters addressing the question of who should have standing to invoke non-duplication protection agree that the affiliate should retain that right.[220] Commenters also argue that carriage of an affiliate signal on the cable is not an appropriate precondition for enforcement by a broadcaster of his non-duplication rights. We agree with this view, for the reasons discussed above with respect to the syndicated exclusivity rule protection.[221] Several commenters have also expressed the view that our current waiver policy misplaces the burden of proof of harm on broadcasters, and unduly limits the presumption of a station's right to exercise reasonable exclusivity within the limits of the station's contractual arrangements with the network.[222]

115. NCTA, TCI, CATA, and "Coalition" were the only commenters opposing changes in the non-duplication rules, with only the latter two commenting in detail. "Coalition" desires to keep exemptions for small systems (fewer than 1,000 subscribers), and is concerned as well that its members not be required to delete translators. CATA opposes changes in the rules on the grounds that, when coupled with syndicated exclusivity protection, an imported network affiliate would have little left to offer.

116. *Discussion*. We continue to believe that the private organization of networks is an efficient method of doing business, and that it is in the public interest to allow enforcement of reasonable exclusivity to support that method of distribution. As CBS says: "In a word, the relationship between a broadcast network and its affiliates is one of intense symbiosis. It is fundamentally premised both on the network's ability to acquire exclusive rights from its suppliers, and on the affiliated stations' ability to enjoy program exclusivity in their respective marketplaces. This vital feature of the system of free over-the-air television has been true for over forty years."[223] Networking spreads the cost of program production over a large audience (as does syndication, of course), but also acts to

reduce the number of distribution links between the distributor and the broadcasters. This is accomplished by distributing the programming simultaneously over a large area.[224]

117. Our network non-duplication rule was originally designed to permit the formation and continuation of broadcast networks. There is evidence that importation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience.[225] Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network.[226] Thus, an effective non-duplication rule continues to be necessary.

118. Technological changes, primarily satellite distribution of signals, that permit easy movement of affiliates' signals across time zones now necessitate a change in the existing rule. The problems that have long arisen in certain portions of the Mountain Time Zone have the potential to spread more generally and severely disrupt network-affiliate relations. This potential has already begun to be realized, as nine network affiliate broadcast stations are being distributed via satellite. In the United States, two satellite delivery companies, Netlink and Satellite Broadcast Networks, have been formed to distribute network signals across time zones. In Canada, Cancom is engaged in the same business, using U.S. network signals.[227] Because technological changes have seriously increased the potential for disruption, we have concluded that an increase in network programming exclusivity protection is necessary to allow network arrangements that provide important benefits to viewers to continue to function efficiently.[228] We have also determined that, similar to syndicated programming, the contractual relationship between a network and its affiliates, rather than the Commission's rules, is the appropriate determinant of the extent of non-duplication protection. Therefore, we shall not limit network non-duplication protection to any particular period of time, leaving it to the parties to determine a mutually agreeable arrangement.

119. We are also aware of the concerns of some parties that expanded network non-duplication rules would discourage carriage of these signals via satellite, thereby depriving home satellite dish users, and particularly those in areas without any access to network signals (so-called "white" areas) of network service. To the extent this is a "white" area issue, we agree that it is desirable that viewers have these signals available. NBC points out that it agrees with this view, and has undertaken arrangements which should make this possible in the near future.[229] It also points out that it is not necessary or desirable to undermine the basic network-affiliate relationship to accomplish this goal. We agree with this view, and are encouraged by the fact that private arrangements are being made to serve these viewers.[230] We also note that expanded control by broadcasters of cable systems' use of network programming may actually facilitate the development of service to white areas, by allaying fears that such signals will be used to dilute an affiliate's effective degree of program exclusivity. More broadly, we have recognized that the retransmission of broadcast signals directly to home dish owners raises significant copyright and communications policy issues.[231] This is a sensitive and complex area, in which arrangements are still evolving; and we are continuing to monitor it closely. Because these issues do not directly affect, and are not affected by, program exclusivity protection, however, we will continue to consider these issues separately.

120. *Extent of non-duplication protection.* Network non-duplication protection has a purpose analogous to that of syndicated exclusivity; namely, to allow all participants in the marketplace to determine, based on their own best business judgment, what degree of programming exclusivity will best allow them to compete in the marketplace and most effectively serve their viewers. For this reason, we have determined that, where possible, network non-duplication protection should conform as closely as possible to our other programming exclusivity provisions.

121. We shall retain the current geographic limits, including the priorities set forth in 47 C.F.R. Section 76.92 and the exceptions thereto as set forth in 47 C.F.R. Section 76.92(f) and (g) on the extent of non-duplication protection, pending further exploration in the *Further Notice of Proposed Rule Making* on geographical issues. Networks and their broadcaster affiliates currently enter into contractual arrangements that determine the effective exclusivity held by a broadcast station as it transmits network generated programming. Moreover, very importantly, a network is free to decide with which stations it will or will not enter into affiliate agreements. The network is thereby enabled to control the geographic distribution of its programming. Any conflicts, or potential conflicts between stations, are currently built into the system at the outset through the contractual process, since the network is a party to each and every contract. The same contractual process, involving the same parties, should also serve to apportion non-duplication rights vis-a-vis cable retransmissions. In short, affiliate broadcasters' reasonable expectation of exclusivity against other broadcasters and cable systems alike is determined when they enter into their affiliate relationship. The network's incentives to reach as many viewers as possible, coupled with the fact that rights to such non-duplication protection (*e.g.*, exclusivity rights) will be costly, should ensure that the availability of network signals to viewers will be maximized under these rules. Finally, for reasons analogous to those discussed in connection with our syndicated exclusivity rules, cable systems serving fewer than 1,000 subscribers will continue to be exempt from these rules, as currently provided in 47 C.F.R. Section 76.95(b).[232]

122. As suggested by most of the commenters who addressed this issue, we shall leave enforcement of network non-duplication to the local broadcaster. Broadcasters and networks generally agree that their interests are similar, and therefore that conflict between them on this issue is unlikely.[233] Where a broadcaster and cable system have a good relationship, and/or are able to enter into an agreement not to invoke exclusivity protection, we see no reason to interfere with such arrangements. Coalition of Small Cable Operators agrees on this point.[234] CBS, however, argues that the network also should be able to invoke exclusivity.[235] In particular, it argues it should be able to invoke protection directly against the entities who are marketing "involuntary" network superstations, which may have only a small effect in any one market, but a large effect nationwide. We are not persuaded that such harm is likely, or that network intervention is required to prevent it. Broadcasters themselves have a strong interest in preserving the network-affiliate relationship, and in any

event, adoption of contractually determined protection should suffice to eliminate the problem of duplication by network superstations. Thus, as in the general case of syndicated exclusivity rules, standing to invoke exclusivity protection will lie solely with the broadcaster. We also affirm that a broadcaster need not be carried on a cable system in order to enforce network non-duplication protection for which it has negotiated.[236] It is sufficient that the broadcaster holds non-duplication rights as an element of its affiliate contractual arrangements.[237] Finally, we adopt notification procedures, whereby affiliates enforce the non-duplication protection for which they have bargained, that are the same as those we have adopted for syndicated exclusivity.[238] We emphasize that under the provisions adopted herein broadcasters need give notification to affected cable systems only once for each contract, whether for syndicated or network programming, as provided in the rules. We note that because of the simultaneous nature of most network programming, notice and compliance procedures should be relatively straightforward.

123. Several broadcaster commenters have requested that we review our policy of granting cable systems waivers of compliance with the network non-duplication rules.[239] Our practice has been to allow a cable operator to demonstrate that no significant harm would befall the broadcast station by virtue of his duplicating the network signal. The burden is then shifted to the broadcaster to demonstrate that he will suffer harm if the waiver is granted.[240] Because we are retaining and strengthening our network non-duplication rules, and placing greater reliance on the contractual relations between the parties, we no longer believe this is a proper criterion for granting waivers. Our concern in this proceeding is that broadcasters and program suppliers be free to enter into effectively exclusive arrangements, because we have concluded that the effect of such arrangements is to increase the supply or quality of programming to viewers and to promote efficient arrangements for the delivery of network product. We have concluded that our current waiver policy with respect to the network non-duplication inappropriately interferes with such contractual arrangements.[241] Moreover, by placing the burden of proof of showing harm on the affiliate broadcaster, it makes the same "wrong question" mistake as the Commission did in 1980 with respect to syndicated exclusivity.[242] The relevant question is whether such exclusive arrangements ultimately operate to foster competition among the various program providers and promote a greater diversity of programming for viewers. By providing an underpinning for efficient network arrangements, the network non-duplication rules promote such an outcome. Therefore, with this *Order* we eliminate our existing waiver policy.[243] With respect to existing waivers, upon proper notification by the broadcast television station requesting non-duplication protection, the cable television system shall comply therewith by August 18, 1989, or sixty days after notification, whichever is later.[244] We note, however that, as in the case of syndicated exclusivity, cable systems remain free to negotiate with the local broadcast affiliates of networks for the right to continue such carriage.[245]

IV. AUTHORITY

124. We now turn our attention to whether our action herein is within the authority delegated to us through the Communications Act and consistent with the first amendment. In the *Notice* we expressed our belief that promulgation of these exclusivity rules lay within our authority and that there was no statutory or constitutional impediment to our taking the proposed action. While many commenting parties shared our belief, those opposed most particularly to syndicated exclusivity asserted that the Cable Act of 1984, the Copyright Revision Act of 1976, or the first amendment impose legal barriers to our reimposition of these rules.[246] We have examined carefully the arguments of those commenters claiming that we lack authority. These arguments have failed to persuade us that our initial assessment of our statutory authority was incorrect. Accordingly, we reaffirm our belief that our action amending and extending our exclusivity provisions with respect to network and syndicated programming is within the scope of our authority under the Communications Act and is consistent with the first amendment.

A. The Copyright Revision Act of 1976

125. We turn first to the issues raised most particularly with respect to our statutory authority to extend our exclusivity rules to syndicated programming. As we have already explained, reinstating syndicated exclusivity protection represents an effort to achieve full and fair competition among providers of syndicated programming to the public. Those provisions of the rules will assure that broadcasters enjoy the ability to negotiate for exclusive rights to exhibit such programming that cable operators now enjoy. In the *Notice*, we observed that our general authority to regulate the relationships of broadcasters and program suppliers is well-established. *See National Broadcasting Co. v. U. S.*, 319 U.S. 190 (1943); *see also United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding Commission's authority to apply signal carriage rules, including nonduplication rules, to cable systems). We also found express authority for these rule provisions in section 624(f)(2) of the Cable Act.[247] Nevertheless, some parties have asserted that the Copyright Revision Act of 1976 precludes our taking this action. These parties concede that if we demonstrate "legitimate communications policy objectives," the Copyright Act would impose no legal barrier to our adoption of syndicated exclusivity rules. They insist, however, that our concerns in this proceeding are with copyright, not communications, issues.

126. In particular, those parties believe that communications objectives are implicated only if the rules are based on concerns for the survival of over-the-air broadcasting or if there is an insufficient amount of local or other programming available. [248] In contrast, they believe that matters relating to "unfair competition" between cable and broadcasters as a consequence of the compulsory license, are exclusively copyright issues beyond the Commission's jurisdiction.

127. We have examined their claims and find no support for a conclusion that these rules are precluded by the Copyright Act. In *Malrite T. V. of N. Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), the court addressed the limits imposed on this agency by the compulsory license scheme and concluded only that the Copyright Act bars FCC rules that are inconsistent with the "basic arrangement" of that legisla-

tion. In particular, retransmission consent was found to be beyond the Commission's authority because it would function no differently from full copyright liability, which Congress had expressly rejected. *Id.* at 1148. The court thus upheld the Commission's decision not to impose a retransmission consent requirement on cable systems.

128. The instant rules are, of course, far different from rules requiring retransmission consent. As MPAA points out, a retransmission consent requirement would extend to *all* programming (syndicated, network-originated, or locally originated), broadcast by *all* television stations, local and distant. In contrast, the syndicated exclusivity rule provisions extend only to a specific, limited type of programming; namely that syndicated programming for which copyright owners and local broadcasters have bargained for exclusive rights.[249] It is thus a far more limited proposal and does not upset the basic structure of the compulsory license scheme.[250]

129. Moreover, as the *Malrite* court observed, the Copyright Act expressly recognizes the "legitimacy within the statutory plan" of FCC modifications to the compulsory licensing system through revisions to its program exclusivity rules. *Id.* at 1147. Thus, prior to passage of the Copyright Act, the Commission urged that a revised copyright law leave detailed regulation of cable television signal carriage to administrative control, because "[e]xclusivity is a complex, dynamic subject that is most appropriately a matter for agency action."[251] In response, Congress deliberately chose to leave regulatory responsibility over matters like program exclusivity to this agency. Thus, section 111(c)(1) of the Copyright Act grants cable systems a compulsory license to retransmit broadcast signals the carriage of which is "permissible under the rules, regulations or authorization of the Federal Communications Commission," 17 U.S.C. Section 111(c)(1). In discussing this provision, the House Report explained that

> any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulation adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy," the Committee has been cognizant of the interplay between the copyright and communications elements of the legislation.[252]

Congress was thus aware that there is close interplay between communications policy and the intellectual property issues addressed in the Copyright Act, concluding, in effect, that cable operators should not receive the benefits of a compulsory license for the carriage of signals that the Commission deems impermissible for communications policy purposes.[253] Apart from the basic compulsory license scheme, however, Congress did not statutorily define the boundaries of intellectual property issues and communications policy concerns. Instead, recognizing our legitimate interest in this area, Congress removed itself from this arena and left enactment of any program exclusivity rules to our future discretion.

130. Furthermore, Congress was aware of the Commission's syndicated exclusivity rules and expressly accommodated them within the new Copyright law. Thus, section 801(b)(2)(c) gives the Copyright Royalty Tribunal authority to adjust royalty payments for the compulsory license in order to reflect any subsequent changes in the Commission's 1972 syndicated exclusivity rules. The House Report explained that "[i]f these rules are changed in the future *to relax or increase* the exclusivity restrictions, . . the royalty rates paid by cable systems should be adjusted to reflect such changes."[254] The Copyright Act thus did not supplant FCC authority over program exclusivity provisions; rather, it accommodated our authority within the statutory scheme of the Copyright Act.[255] In short, the Copyright Act forecloses only FCC rules, like retransmission consent proposals, that fundamentally change the compulsory license scheme. Congress recognized, however, that communications policy makers have a legitimate interest in program exclusivity arrangements. Therefore, it expressly permitted modifications to the compulsory license scheme through amendments to the FCC's program rules.

131. Finally, nothing in the Copyright Act or the Communications Act suggests that communications policy issues must be limited to those matters that affect the very "survival" of broadcast stations. The ability of broadcasters to compete at optimum levels, free of unfair competitive burdens, is a proper concern of this agency insofar as such policies are designed to improve communications services to the public.[256] We need not demonstrate that the very survival of broadcasting is at risk in the absence of syndicated exclusivity rules in order to conclude that the competitive well-being of broadcasters, a concern certainly within our jurisdiction, will be enhanced by the adoption of such rules. We have already explained why adoption of these rules will eliminate a competitive advantage held by cable that undermines our reliance on full and fair competition to achieve our statutorily mandated goals.[257] We have also explained why elimination of that imbalance should lead to greater diversity in the programming available to the viewing public -- whether that public does its video viewing on cable or broadcasting stations. Accordingly, we think the matters addressed in these rules are squarely within our jurisdiction.

B. The Cable Act of 1984

132. As discussed above, we think the Copyright Act clearly permits the extension of our exclusivity rules to include syndicated programming. Indeed, the Copyright Act expressly contemplates that the FCC may adjust the scope of the Copyright Act's compulsory license by permitting or disallowing cable carriage of certain signals or programming within those signals to which a broadcaster has exclusive exhibition rights. A second legal issue in this proceeding concerns the effect of section 624(f)(1) of the Cable Act on these rules. The commenters have debated at length whether that provision was intended to foreclose FCC rules that enable program exclusivity rights to be enforced against cable systems. Section 624(f) provides:

> (f)(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.
>
> (2) Paragraph (1) shall not apply to --
>
> (A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be

amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

(B) any rule, regulation, or order under title 17, United States Code.

133. In the *Notice* we expressed our tentative view that, by permitting broadcasters to enforce contractual exclusivity provisions against cable, we would not be imposing a programming requirement on cable systems within the contemplation of section 624. We recognized that broadcasters currently cannot enforce contractual exclusivity rights for syndicated programming against cable systems unless the FCC extends its exclusivity rules contemplated herein. But the net effect of reinstating syndicated exclusivity is merely to enable unrestricted contractual relationships among the parties involved; it does not impose a programming service obligation or requirement on cable systems, as commonly understood, or as envisioned by Congress in section 624.

134. Parties opposing syndicated exclusivity protection vigorously dispute our interpretation of section 624. In their judgment, the use of the word "requirements" in that provision has only one plausible explanation; namely, it was intended, in their view, to preclude the FCC from enacting any regulation whatsoever that directly or indirectly affects the content of cable programming, including provisions like syndicated exclusivity rules. Indeed, they say, section 624 is so clear on its face that the statute's interpretation can, and must, be accomplished without resorting to the legislative history.

135. Proponents of the rule are just as convinced that we possess the necessary authority. They think that the term "requirements" in section 624 was only intended to preclude the imposition of affirmative programming obligations on cable systems. As evidence, they point to the difference in meaning between the word "requirements" used in section 624 and words such as "regulate" and "restrict," which were not used in that section. Had Congress intended to forbid any restrictions or limitations on cable programming, they argue, Congress would have used such words. These parties also discuss at length the legislative history of section 624, which, in their view, supports their interpretation.

136. We think the term "requirements" used by Congress in section 624(f)(1) is susceptible to more than one reasonable interpretation. Indeed, the divergence of opinion of the commenting parties supports this conclusion. In some contexts, "requirements" may be used in a broad sense to connote any command or direction, whether the requirement is affirmative or negative. However, the word is also commonly used to connote qualities of a positive nature that are wanted or needed.[258] Because the word "requirements" has more than one accepted meaning, examination of the legislative history of section 624 is justified in order to determine the congressional intent.

137. Before examining that history, however, it is appropriate to analyze carefully the statutory language itself. Section 624 is generally concerned with the program service and facility "requirements" that franchising authorities are permitted to impose on cable systems during the franchising process. The term requirements is thus used in three places in that section, as Congress speaks of: a franchising authority's power to establish " *requirements* for video programming or other information *services* " (section 624(b)(1); " *requirements* contained within the franchise . . . for broad categories of video programming or other *services* " (section 624(b)(2); and " *requirements* contained within the franchise for the provision of *services* " (section 624(c)). Finally, in section 624(f)(1), the provision directly at issue, Congress again speaks of Federal and state or franchising authorities' " *requirements* regarding the provision or content of cable *services*. " (Emphasis added.)

138. In interpreting section 624, it is reasonable to assume that Congress used the term requirements in the same sense throughout. It is also apparent that the first three times the term is used in section 624, Congress was referring to the types of programming services that franchising authorities could require of cable systems during the franchise process. In particular, in the first three provisions Congress was concerned with the extent to which franchising authorities could dictate the program services that cable systems must provide for their subscribers. Logically, therefore, Congress used the term "requirements" in essentially the same sense in section 624(f)(1), when it referred to program services that may not be required by this Commission, a state or a franchising authority.

139. This interpretation is supported by the legislative history. In describing the purpose and scope of section 624, the House Report explicitly recognized that cable franchising is regulated, not only by state and local authorities, but by the FCC as well. Thus, the pertinent legislative history notes that "[t]he FCC has also exercised some control over cable franchising," and observes that the Cable Act will establish "national standards which clarify the authority of Federal, state and local government to regulate cable through the franchise process." H.R. Rep. No. 934, *supra*, at 23.

140. The general purpose of section 624 was thus to prevent "franchising authorities," including, potentially, the FCC, from imposing various types of program service obligations. In particular, the House Report noted that "[m]any franchise agreements in effect today specify... the services that the operator must provide (*e.g.*, Cable News Network, HBO, The Health Channel). . . . However, *the Committee does not believe it is appropriate for government officials to dictate the specific programming to be provided over a cable system*, and H.R. 4103 reflects this determination." *Id.* at 26 (emphasis added); *see also id.* at 68-69 (in a request for proposals, cable operator "may not be required to provide particular video or other information services. . . [and] [t]he Committee does not intend by this provision to give franchising authorities . . . the authority to require the cable operator to offer certain program services or service packages").

141. After an extensive discussion of these concerns, the House Report speaks of subsection 624(f)(1) in particular and states simply that the provision "limits the authority of the FCC and other Federal, state or franchising authority to regulate the provision or content of cable services other than as provided in this new title . . . ." *Id.* at 70. The Report also notes that existing FCC programming service obligations, like the must carry rules, would be grandfathered. *Id.* Absent any additional explanation, it thus is reasonable to assume that the purposes underlying section 624(f)(1) were no different than the concerns, previously discussed at length in the Committee Report, that motivated the other provisions of section 624. In

particular, the government should not "dictate the specific programming to be provided over a cable system." H.R. Rep. No. 934, *supra*, at 26.

142. We thus conclude that a fair reading of the actual language of section 624, particularly when examined in conjunction with the legislative history, supports an interpretation that Congress intended to foreclose any franchising authority (federal or state) from requiring cable systems to provide particular program services. Readoption of syndicated exclusivity protection does not, therefore, fall under the prohibition. By re-establishing syndicated exclusivity, the Commission is not dictating the program services that a cable system must carry, either directly or indirectly. Rather, the Commission is permitting broadcasters to enforce their contracts, where they have bargained for exclusivity rights.[259] Permitting contracting parties to enforce the provision of their contracts is entirely different from expressly requiring that cable carry certain program services.

143. Further support for our interpretation of section 624(f)(1) can be found in the division created by the Act regarding the treatment of affirmative content requirements on cable speech versus negative content restrictions on such speech. As discussed above, section 624(f)(1) discusses limitations on the ability of federal, state and local authorities to impose "requirements" on the "content of cable services." Our interpretation that this provision addresses only affirmative requirements on programming is bolstered by the fact that the Act addresses "negative" restrictions on the content of cable services separately in other sections of the Act.

144. For example, section 638 permits the imposition by federal, state and local authorities of criminal or civil liability on cable operators through laws restricting "libel, slander, obscenity, incitement, invasion of privacy, false or misleading advertising, or other similar laws." 47 U.S.C. ' 638.[260] Congress, in fact, imposes such a restriction separately in section 639 of the Act, prohibiting, under federal law, the provision of cable speech that is "obscene or otherwise unprotected by the Constitution." Likewise, section 624(d)(1) of the Act addresses negative restrictions on cable speech by permitting franchising authorities to prohibit cable services that are "obscene or are otherwise unprotected by the Constitution of the United States," 47 U.S.C. ' 624(d)(1). In explaining the purposes underlying sections 638 and 624(d)(1), the House Report observed that "the Committee does not intend to affect liability from other speech which may be held by the courts to be unentitled to constitutional protection . ." H.R. Rep. No. 934, *supra*, at 95. Thus, whereas most of section 624 (except subsection 624(d)(1)) addresses *affirmative requirements* to provide programming on cable systems, Congress addressed separately (most particularly in sections 638 and 639) the issue of *negative restrictions* on the provision of such programming.

145. The dichotomy between affirmative requirements and negative restrictions on the content of cable services established by the Act lends additional support to our conclusion that Congress' use of the word "requirements" in section 624(f)(1) was intended to apply only to *affirmative* program requirements.[261] For these reasons, we are not persuaded that section 624(f)(1) was intended to prohibit these amendments to our program exclusivity rules.

146. We are not unmindful, however, that subsection 624(f)(1) might conceivably be read more expansively by some. Commenters who argue for such a wide interpretation contend that Congress could have intended to foreclose not only program requirements, but any program restrictions -- both direct and indirect -- as well. In considering our authority to adopt these rules, we have therefore examined a number of additional factors that bear on congressional intent.

147. We first observe that Congress expressly excluded from the ambit of section 624(f)(1) matters pertaining to the copyright laws. Congress provided, in section 624(f)(2)(B) that section 624(f)(1) "shall not apply to any rule, regulation, or order under title 17." The legislative history explains this provision, stating that the new law "does not affect the Copyright Act nor rules, regulations and and orders issued thereto. It is not intended to affect Federal statutes or regulations, including those related to copyright. . ." H.R. Rep. No. 934, *supra*, at 70. The rule adopted in this proceeding is enacted pursuant to our authority under the Communications Act and not under the Copyright Act. Nevertheless, as previously discussed, section 111(c)(1) of the Copyright Act reflects Congress' intention that the parameters of the compulsory license not be codified into law; the scope of the compulsory license would instead be subject to refinement and adjustment by the FCC, as changing circumstances might require. Thus, Congress provided that the compulsory license shall apply to signals that the Commission determines are permissible for the cable system to carry. 17 U.S.C. section 111(c)(1)(1981). And, because it envisioned that the Commission would redefine the category of permissible signals,[262] Congress gave the CRT power to adjust the copyright royalties accordingly. 17 U.S.C. section 801(b)(2)(C)(1981).[263]

148. The expansive interpretation of section 624(f)(1) proferred by opponents of syndicated exclusivity would, however, foreclose the Commission's ability to take any action or adopt any rules that would narrow the scope of the compulsory license as it is now codified. A broad interpretation thus would upset the balance struck by Congress when it set forth the appropriate relationship between the Copyright Act's compulsory license and communications policy. In so concluding, we fully recognize that the Copyright Act did not resolve specific communications policy issues relating to "pay cable regulation or increased use of imported distant signals." H.R. Rep. No. 1476, *supra*, at 89; *see Malrite*, *supra*, at 1148. The Copyright Act, however, does assume that the definition of "permissible signal" (that is, the use of imported distant signals and program exclusivity arrangements with regard thereto) will be subject to continuing regulatory oversight by this agency, and enactment of the compulsory license was predicated on that assumption. Therefore, because section 624(f)(1) was not intended to affect the Copyright Act, including, presumably, *all* of the policies reflected therein, we think it especially unlikely that Congress intended to prohibit the particular rules at issue.[264]

149. At a minimum, had Congress intended such a wholesale revision of the copyright scheme, we think it would have been explicit in effectuating such a change. In interpreting another provision of section 624, relating to FCC authority over cable technical standards, the Supreme Court refused to infer that Congress intended to work a change in the regulatory scheme that existed prior to the Cable Act by withdrawing power from the FCC. *See City of New York* v. *FCC* 108 S. Ct. 1637 (1988). The Court observed that Congress in the Cable Act had acted against a background of pervasive federal regulation over

technical standards, and that the Commission's longstanding authority therefore should not be disturbed without express evidence of such an intent in the legislative history. *Id.* at 4417-18. Similarly, section 624(f)(2)(B) expressly leaves intact the pre-existing regulatory scheme embodied in the Copyright Act, including, we believe, the FCC's authority over program exclusivity arrangements, which is uniquely intertwined with the copyright scheme. Because the legislative history of section 624(f)(2) contains no suggestion whatsoever that the FCC's well-established and congressionally recognized authority over exclusivity arrangements was to be modified by the Cable Act, we do not infer that Congress intended such a result.

150. We believe that yet additional support for our conclusion that we have the authority to adopt the rule amendments at issue here is expressly derived from subsection 624(f)(2)(A)(ii) of the Cable Act, which permits the FCC to regulate cable by amending any rule in existence on the effective date of the Cable Act, so long as the amendment "is not inconsistent with the express provisions of [the Cable Act] . . . ."[265] As MPAA notes in its comments, Congress provided no specific guidelines in subsection 624(f)(2)(A)(ii) for determining the scope of an appropriate amendment. In analogous settings, MPAA observes, the scope of an appropriate amendment ordinarily is determined by the concept of "germaneness." For example, when a specific section of a bill is to be amended, "the matter embodied in the amendment must be germane to the subject matter of other sections." C. Sands, *Sutherland Statutory Construction* Sec. 22.08, at 120 (4th ed. 1982); *see* 99th Congress, *Rules of the House of Representatives*, Sec. 795, at 524. Further, the germaneness of an amendment to a bill is determined by examining the amendment's fundamental purpose: "[t]he fundamental purpose of an amendment must be germane to the fundamental purpose of the bill." MPAA Comments, at 104, quoting 99th Congress, *Rules of the House of Representatives* section 798(b), at 529.

151. We agree that germaneness is an appropriate test for determining whether rule amendments are authorized under section 624(f)(2)(A)(ii). We also conclude that these rules meet that test. As set forth in the *Notice*, we think the rule amendments are appropriate amendments to our network non-duplication rules, which prevent a cable system from simultaneously importing another network program signal into its market. The purpose of the network non-duplication rules is to preserve a broadcast affiliate's rights to be the exclusive distributor of a network's programming. The rule amendments adopted herein merely permit exercise of those same rights when a broadcaster (whether a network affiliate or an "independent" station) airs syndicated programming for which it has negotiated exclusive distribution rights.

152. Moreover, as we observed in the *Notice*, the Commission has historically considered syndicated exclusivity rules as part of the penumbra of rules governing program exclusivity rights. The Commission thus originally adopted syndicated exclusivity rules as "an extension of our existing program exclusivity rules to provide more effective protection of syndicated programming." *Cable Television Report and Order*, 36 FCC 2d at 181. Subsequently, the Commission reemphasized the singular relationship of the program exclusivity provisions when it classified its set of signal carriage rules into four "types," one of which was "rules that require the deletion of particular network or syndicated programs from the signals that are carried . . . ." *See 1979 Notice of Proposed Rule Making*, 71 FCC 2d at 1005.[266]

153. In addition, network non-duplication rules and syndicated exclusivity rules are designed for the identical purpose: to enhance a broadcaster's competitive posture vis-a-vis cable systems by allowing the exercise of exclusive rights to programming. *See* also *Notice* at para. 44. Moreover, the network non-duplication rules and amendments enacted herein are uniquely tied by their relationship to the Copyright Act's compulsory license: program exclusivity rules are the only means through which the Commission may permit broadcasters to enforce exclusivity provisions. Consistent with our previous determination that the Cable Act does not modify the general regulatory scheme established by Congress in the Copyright Act, we think Congress intended to permit further amendments to our program exclusivity rules.

154. Parties who assert these rules are not amendments authorized under section 624(f)(2) point to several statements in which the Commission recognized that there were differences under our former rules between the program exclusivity protection afforded to network programming and that afforded to syndicated programming.[267] We have examined these statements and are not persuaded that they demonstrate any fundamental difference in kind between the basic subject matter and purposes underlying our network non-duplication rules and these amended rules.[268]

155. Moreover, the applicability of subsection 624(f)(2) does not turn on whether network programming and syndicated programming must be treated identically under our program exclusivity provisions. We believe it is sufficient to establish that the matters at issue are generically related to the concerns underlying our network non-duplication rules. We note, for example, that section 624(f)(2) expressly contemplates that the Commission might amend its former "must carry" rules to add or delete the classes or types of broadcast stations required to be carried on cable systems. Depending upon the type of station involved, different facts and policies might be relevant in determining how, and whether, must carry rules should apply to a particular type of station. However, amendments to the must carry rules would not for that reason be treated as impermissible under section 624(f)(2). Similarly, we think Congress did not intend to prohibit broadening the scope of our program exclusivity rules merely because there might be some differences in how those rules apply to network and syndicated programming.

156. Parties also dispute whether our former syndicated exclusivity rules were designed to enhance the position of local broadcasters, as are the network non-duplication rules.[269] Whatever the purposes of our former rules, the instant amendments, like the network non-duplication rules, are expressly designed to improve the competitive posture of broadcasters by allowing them to exercise exclusive rights to programming.

157. Finally, opponents of the rules make much of the fact that section 801(b)(2)(c) of the Copyright Act singles out syndicated programming for special treatment by authorizing changes in the compulsory license rates in the event the Commission changes its syndicated exclusivity rules. There is, they note, no parallel provision for the network non-duplication rules. Although these parties offer no explanation for this different treatment of syndicated and network programming in the Copyright Act,

they suggest it must reflect congressional recognition of a fundamental difference between the exclusivity protection afforded to network and syndicated programming.

158. These opponents, however, fail to understand that Congress' different treatment of syndicated and network programming in the Copyright Act had little to do with *exclusivity* concerns, but was based primarily on the difference in distribution schemes for syndicated and network programming and the implications of that difference for compensating copyright holders.[270] Therefore, we think the Copyright Act provision has little, if any, relevance to the permissibility of these rule amendments under section 624 of the Cable Act.

C. Constitutional Considerations

159. Finally, we conclude that the first amendment presents no barrier to our exclusivity rules. At the outset, we observe, as the D.C. Circuit once observed, that "there is nothing novel or startling about a contract granting the exclusive right to publish or broadcast."[271] Nor is there anything startling, from a constitutional perspective, about the authority of government, be it federal or state, to enact laws that enforce and protect individuals' ability to negotiate and obtain exclusive rights in programming. For example, the Constitution expressly authorizes federal laws that grant to authors, for a limited time, "the exclusive Right to their respective Writings."[272] This authority may be exercised co-extensively with the federal government's ability to regulate interstate and foreign commerce.[273]

160. The courts have consistently held that federal and state laws attempting to promote the private distribution of material through the effective grant of exclusivity rights do not violate the first amendment.[274] In *Zacchini v. Scripps-Howard Broadcasting Co.*,[275] for example, the Supreme Court upheld, against a first amendment challenge, a state's common-law recognition of a performer's "right to the publicity value of his performance" and its creation of a cause of action that permitted a performer to recover damages for the "unlawful appropriation" of that right.[276] Analogizing the state law to federal copyright law,[277] the Court held that the first amendment did not prevent a performer from seeking damages for the broadcast of his entire performance by a local news team, which had not first obtained his consent:

> There is no doubt that entertainment, as well as news, enjoys First Amendment protection. . . . But it is important to note that neither the public nor respondent will be deprived of the benefits of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.

Likewise, lower federal courts have upheld, against first amendment challenges, the constitutionality of exclusive rights conferred by the Copyright Act on the grounds that "no restraint [has been] placed on the use of an idea or concept."[278]

161. Our imposition of exclusivity rules (whether for network or syndicated programming) simply accomplishes, in the broadcast-cable communications context, the enforcement of exclusive rights in programming that has been recognized to be well within the constitutional authority of the federal government. The government suppresses no idea or concept by these rules.[279] The government simply establishes a mechanism whereby a particular speaker may control and obtain compensation for the distribution of his or her particular expression of an idea. Cable operators are not enjoined, *per se*, from carrying programming for which local broadcasters hold exclusive distribution rights; they are simply required to respect those broadcasters' economic stakes in that programming. Under exclusivity rules, program suppliers, cable operators and local broadcasters are free to negotiate the terms on which such programming may be distributed. If a program supplier chooses to grant, and a local broadcaster chooses to retain, sole distribution rights in certain programming, then nothing in the first amendment prevents the government from recognizing and enforcing that choice.[280]

D. Conclusion

162. In sum, we conclude that the extension and modification of our program exclusivity rules relating to syndicated and network programming are within the statutory and constitutional authority of the Commission. The adoption of the rules herein is completely consistent with the Copyright Revision Act of 1976, and nothing in the Cable Act of 1984 restricts the Commission's authority to adopt them. Finally, the first amendment presents no barrier to the imposition of these exclusivity rules.

V. NON-NETWORK TERRITORIAL EXCLUSIVITY

163. In the *Notice*, we also sought comment on the possibility of eliminating or modifying Section 73.658(m) of the rules.[281] This rule limits the geographic area in which a television station may obtain exclusivity rights for non-network programs against other broadcast television stations. Specifically, the existing rule prohibits a television station from entering into a contract or arrangement with a non-network program producer, distributor, or supplier which precludes another television station located more than thirty-five miles away from obtaining the broadcast rights to the same programming. The only exception is in the case of hyphenated markets *i.e.* multi-city markets, where a station licensed to a community designated part of a hyphenated market may secure non-network territorial exclusivity against a station licensed to another designated community of that market.[282]

164. In its 1973 decision adopting Section 73.658(m), the Commission concluded that non-network territorial exclusivity limits were needed to provide administrative certainty with regard to programming and economic judgments for stations seeking to purchase programs being shown on other stations. [283] In particular, the non-network territorial exclusivity rule was intended to ensure that stations located in fringe or "overshadowed" markets have access to a large pool of non-network programming. The objective of the rule was to encourage the development of new stations, thus furthering the Comission's allocations plan goal of fostering national television service.[284] The Commission also stated that it hoped the rule would enable a larger audience to view good non-network programs and would promote program diversity for the many "fringe area" station audiences.

165. Currently before the Commission are several waiver requests addressing the non-network territorial rule and the limitations it imposes on contractual relationships.[285] Insofar as the *Notice* concerned the question of exclusivity

protection afforded broadcast licensees and program distributors in the cable context, we also believed it would be consistent to examine the issues raised in these waiver requests by reevaluating our non-network territorial rule. In the *Notice* we observed that there have been significant changes in the video marketplace and the program supply industry since the rule was adopted such that the original purpose of the rule appeared to have been fulfilled. We also indicated that the rule appeared to infringe on the rights of parties negotiating contracts for program exhibition and that the competitive environment of the marketplace interest. We therefore stated that we were concerned that the rule may be hindering the efficient functioning of the marketplace for non-network programs contrary to our policy of promoting program diversity and growth. We also indicated that we did not forsee any market failure which would necessitate our continued intervention into the contractual relationships between television stations and program distributors. Finally, we observed that because the degree of exclusivity desired by stations varies across programs, markets, and stations, a rule that imposes specific geographic limits on exclusivity appears to create artificial markets that do not reflect actual competitive relationships. Thus, we sought comment on three general issues that relate to the need for the territorial exclusivity rule: 1) competitive market forces; 2) changes in the market; and 3) impracticality of a general rule.

166. Although twenty-nine of the parties participating in this proceeding addressed the non-network territorial exclusivity rule in their comments and four parties submitted reply comments on this issue, the issue of syndicated exclusivity has nonetheless overshadowed our concurrent consideration of the territorial rule. The commenting parties generally focused only limited attention on the territorial exclusivity matter and, in fact, many simply indicated either their general support or opposition to our proposal to eliminate the existing rule. Thus, the record does not provide us with sufficient information to determine whether there is a continuing need to maintain some form of this rule. Accordingly, we will not decide herein whether to retain or eliminate the non-network territorial exclusivity rule. Instead, we will issue a Further Notice of Proposed Rule Making (Further Notice) in the near future to seek additional comment and information on the geographic limits of all program exclusivity arrangements, including those established under non-network territorial exclusivity. Separate consideration of the issues associated with the territorial exclusivity rule will provide us with a more comprehensive record on which to base our decision whether to retain, modify, or eliminate this rule. However, as discussed below, we are in this order modifying the existing rule in one respect to permit broadcast stations to purchase nationwide exclusivity against other broadcast stations.

167. Among the matters to be considered in the Further Notice are several specific points raised by commenters that we believe warrant further opportunity for discussion and presentation of factual information by interested parties. For example, we note that MPAA states that the existence of the territorial exclusivity rule, in fact, encourages the production of syndicated programming, rather than limits it as we suggested in the *Notice*. However, MPAA does not provide detailed discussion or analysis of this argument, which would seem to run counter to the argument they made supporting reimposition of syndicated exclusivity protection. We also observe that several commenters, especially Southern Broadcasting of Sarasota, submit that while, in general, more programs are available than in the past, there remains a scarcity of programming with high audience appeal, which stations claim they need most. While we observe that all goods and services that cannot be provided in unlimited quantities at zero price are "scarce," we believe that more information is needed regarding the extent to which programming with high audience appeal remains limited and is needed by stations located in fringe or overshadowed markets. In addition, the record provides little information on the effect that elimination or modification of the rule would have on populations in the portions of a fringe or overshadowed stations' service area which are not within the Grade B contour of the central city station (*i.e.*, populations located in the nonoverlapping fringe area). Therefore, in the Further Notice, we will ask commenters to provide additional information on the effects of a rule change eliminating or modifying the territorial exclusivity rule on populations in these areas.

168. Until we are able to develop a more complete record regarding the non-network territorial exclusivity issue, the existing rule will essentially remain in place in its current form. We will, however, modify the rule in one important respect. Consistent with our action in this decision to reinstitute our program exclusivity protection to syndicated programs, we believe it is appropriate and desirable to relax the territorial exclusivity rule to permit broadcast television stations that are competing with cable services for viewers on a national basis to acquire national exclusivity rights for the exhibition of non-network programming against all other stations.[286] This change also will permit broadcast stations to purchase cable syndicated exclusivity on a national basis whenever they have obtained national broadcast exclusivity rights. In particular, the revised rule will permit broadcast "superstations" to obtain full exclusivity rights to programs they present to viewers nationwide through cable service. Where a station determines that it is in its best interest to bargain for and purchase national exclusivity rights, and where the program supplier agrees to sell such rights, no other station will be able to obtain the rights to exhibit such programming.

169. This modification of the territorial exclusivity rule will further our objective of encouraging diversity by allowing superstations to structure their schedules with programming that will not duplicate the programming of broadcast stations in local areas. It also is expected to contribute to our objective of encouraging program development by providing greater discretion for program suppliers to package their products to suit particular markets, in this case a national cable audience. In addition, since superstations tend to compete with cable networks for the purchase and display of programs, it will allow superstations the option of bargaining for the same set of rights that cable networks may bargain for. Moreover, to the extent that superstations obtain national exclusivity for their program schedules, or portions thereof, this change will contribute to the avoidance of blackouts and program replacements.

170. We also find that to permit broadcasters to contract for national program exclusivity arrangements against other broadcast stations is not inconsistent with the original intent of the territorial exclusivity rule. The principal purpose of the rule was to ensure the availability of non-network programming for stations located in

overshadowed or fringe markets located near larger television markets. The limited rule change we are adopting will not impede the ability of such stations to obtain programming that is also being used by other stations in nearby markets. We also see no reason to expect that desirable syndicated programs would be purchased on a national basis to an extent such that it would affect the availability of high audience appeal programming for local stations in either large/central markets or fringe markets. We wish to emphasize that nothing in this modification of the rule alters the option that broadcast stations have to purchase rights for the exhibition of non-network programming on a non-exclusive basis.

VI. PROCEDURAL MATTERS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

171. We opened this proceeding in February, 1987, with the adoption of a *Notice of Inquiry and Notice of Proposed Rule Making*. That *Notice* posed three questions: (1) whether we should reinstitute some form of syndicated exclusivity protection that would permit broadcasters to negotiate for enforceable exclusive exhibition rights with respect to syndicated programming; (2) whether we should modify our network nonduplication rules which currently permit network affiliates to show network programming on an exclusive basis; and (3) whether we should relax or eliminate the territorial exclusivity rules which delineate the maximum amount of geographic exclusivity a broadcaster may obtain vis-a-vis other broadcasters. After full and careful review of the comments herein, we have affirmatively answered all three questions posed in the *Notice*. In this *Report and Order* we make three changes to our rules relating to program exclusivity in the cable and broadcast industries. First, we adopt simplified syndicated exclusivity rule provisions that should promote fair and efficient competition among all the delivery systems for video programming from which viewers may select. These rule provisions will permit, but not require, broadcasters to obtain the same enforceable exclusive distribution rights in syndicated programming that all other video programming distributors already enjoy. We also modify our network non-duplication rule provisions to extend their scope to temporally unlimited protection against transmission of network programming and to simplify their administration and enforcement. Finally, we retain the thirty-five mile limit on territorial exclusivity, but intend to issue a Further Notice on the issue and we do modify it in one respect -- to permit broadcast stations to purchase nationwide exclusivity against other broadcast stations.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis. Commission assessment and changes made as a result.

172. *Issues Raised*. Despite the specific request therefor in our Notice (Par. 83), no comments were specifically directed to the initial regulatory flexibility analysis. However, in the general comments two matters were raised which the parties urged would affect small cable systems and one matter was raised with respect to broadcasters. Several cable parties urged that enactment of syndicated exclusivity rules would lead to the demise of the carriage of superstations by all cable systems and would be particularly harmful to small cable systems. Cable parties also urged that the equipment and manpower costs triggered by syndicated exclusivity would be extremely burdensome to small cable systems. Broadcasters were concerned with the potential paperwork burden with respect to the preparation of notices requesting syndicated exclusivity protection.

173. *Assessment*. The above two cable-related issues were considered and treated in our *Report, supra*. We there (Paras. 77-79) rejected the theory of the demise of superstations, and further pointed out the ready availability of substitute--and diverse--programming. With respect to implementation costs, the *Report* (Paras. 83-88) concluded that such costs have been substantially overstated by the parties opposed to the imposition of the rules, that the cost of switching equipment has become quite reasonable and can be amortized over a period of time, that new technological developments would substantially reduce manpower costs, and that the costs of providing syndicated exclusivity protection do not appear to be prohibitively large, even for smaller cable systems. With respect to the concern of broadcasters over the potential paperwork burden in connection with the preparation of notices, in response thereto in drafting our rules we have attempted to design such procedures in as simplified and efficient a manner as possible; further, we note that the implementation of new paperwork requirements and burdens will be subject to the approval of the Office of Management and Budget.

174. *Any changes made as a result of comments*. Our final decision in this matter reflects our consideration of these proposals and the effect of our policies on small business entities in both the broadcast and cable industries. The minor changes in our territorial exclusivity and network nonduplication rules do not appear to have any adverse impact upon small entities and, indeed, in some instances may be of some benefit. With respect to the syndicated exclusivity rules, we believe their restoration will enhance competition in the video marketplace, and although the manner in which cable systems do business may in some cases be altered, we believe that compliance costs will not be unduly burdensome.

III. Significant alternatives considered and rejected.

175. We have considered all the alternatives presented in the Notice and those presented in the record in this proceeding. After full consideration of all the issues raised throughout the course of this proceeding, we have adopted rules that we believe are the most reasonably fashioned in light of the facts and issues presented.

176. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget as prescribed by the Act.

177. The Secretary shall cause a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164.5 U.S.C. Section 601 et seq., (1981)).

178. Accordingly, IT IS ORDERED THAT under the authority contained in Sections 4(i), 4(g), 302, 303(a) and 604 of the Communications Act of 1934, as amended, Parts 73 and 76 of the Commission's Rules and Regulations ARE AMENDED as set forth in the attached Appendix B subject to approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980.

These rules and regulations ARE EFFECTIVE **August 18, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster
Acting Secretary

APPENDIX A

Parties Filing Comments[1]

Abbeville Cable TV
*ABC Television Affiliates Association
Adelphia Communications Corp. *et al* ("Joint Comments")
Alert Cable TV of North Carolina
*Arch Communications
ASCAP, BMI, & SESAC, Inc.
*Association of Independent Television Stations, Inc. ("INTV")
Atlin Communications
Bloomington, Minnesota CATV Advisory Commission
Bonneville International Corp.
Canadian Broadcasting Corp.
*Capital Cities/ABC, Inc.
Capitol Broadcasting Co.
*Community Antenna Television Association ("CATA")
*CBS
*CBS Television Affiliates Assn.
Centel Communications Co.
*Chris-Craft Industries and United Television ("United Television")
Coalition of Small Cable TV System Operators
*Cole, Raywid and Braverman ("Cole/Raywid")
City of Columbia Heights, Minn.
Community Broadcasters Association
Connecticut Cable Television Association
Cosmos Broadcasting
Corporation for Public Broadcasting & National Association of Public Television Stations
Crowley Cable TV
Dayton Telecasting, Inc.
Franklin Cable TV
City of Fridley, Minn.
Gans Systems
Gaylord Broadcasting
Henry Geller and Donna Lampert
Group W
Home Satellite Television Association
*Hubbard Broadcasting, Pappas Telecasting, Channel 50 TV Corp. & Griffin
Jewell Television Corp
Ka'ikena Lani TV
Kentucky Cable Television Association
KLMG-TV
KNTV, Inc.
Lafayette Cable Co.
Lanford Telecasting Co.
*Lorimar
Major League Baseball
Maranatha Broadcasting Co.
Medstar
*Meredith Corporation
Mid-Coast Cable Television
*Motion Picture Association of America ("MPAA")
*National Association of Broadcasters ("NAB")
*National Cable Television Association ("NCTA")
National Hockey League and National Basketball Association
*National Rural Telecommunications Cooperatives
Nationwide Communications
*NATPE International
NBC
New Hampshire
New Iberia Cable TV
National Telephone Cooperative Association ("NTCA")
National Telecommunications and Information Administration ("NTIA")
Oklahoma City Broadcasting
Patterson Cable TV
Providence Journal Co.
Ramsey/Washington Suburban Cable Communications
Rayne Cable TV
Ruston Cable TV
Sarkes Tarzian, Inc.
Satellite Broadcasting and Communications Association ("SBCA")
*Smaller Market UHF Television Stations Group ("SMU")
*Southern Broadcast Corp.
*Tele-Communications, Inc.
Tempo Enterprises
The Television Operators Caucus, Inc.
*The 97 Television Stations
*Time, Inc
Times Mirror
*Tribune Broadcasting
Tulsa 23, Ltd., Channel 24, Ltd., and Southwest Multimedia Corp.
*Turner Broadcasting
*TVX Broadcast Group

United Communications Corp. (KEYC-TV)
United Communications Corp. (WWNY-TV)
*United Video
USA Network
WMUR-TV
WSYM-TV
(The) World Co.

Parties Filing Replies

In addition to those indicated above, the following parties filed replies:
Big River Broadcasting Co.
California Cable Television Association
Durham Life Broadcasting, Inc.
L.E.O. Broadcasting, Inc.
National Basketball Association

APPENDIX B

PROGRAM EXCLUSIVITY RULES

Parts 73 and 76 of Title 47 of the Code of Federal Regulations are amended to read as follows:

1. The authority citations for Parts 73 and 76 continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.658 is amended by redesignating paragraph (m) as paragraph (m) (1) and adding new paragraph (m)(2) to read as follows:

Section 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * *

(m) Territorial exclusivity in non-network arrangements.

(1) No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away, as determined by the reference points contained in Section 76.53 of this chapter, (if reference points for a community are not listed in Section 76.53, the location of the main post office will be used) from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in Section 76.51 of this chapter for those 100 markets listed, and for markets not listed in Section 76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry. As used in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

(2) Notwithstanding paragraph (1), a television station may enter into a contract, arrangement, or understanding with a producer, supplier, or distributor of a non-network program if that contract, arrangement, or understanding provides that the broadcast station has exclusive national rights such that no other television station in the United States may broadcast the program.

* * * * *

3. Section 76.5 is amended by revising paragraph (o) and adding new paragraph (nn) to read as follows:

76.5 (Definitions)

* * * * *

(o) A network program is any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.

* * * * *

(nn) A "syndicated program" is any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming as defined in Section 76.92.

* * * * *

4. Section 76.92-76.99 of the current rules are *removed*, and replaced with the following:

Section 76.92 ***Network non - duplication; extent of protection***

(a) Upon receiving notification pursuant to Section 76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below.

(b) For purposes of this section, the order of non-duplication priority of television signals carried by a community unit is as follows:

1. First, all television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

2. Second, all smaller market television broadcast stations within whose secondary zone the community of the community unit is located, in whole or in part.

(c) For purposes of this section, all noncommercial educational television broadcast stations licensed to a community located in whole or in part within a major television

market as specified in Section 76.51 shall be treated in the same manner as a major market commercial television broadcast station, and all noncommercial educational television broadcast stations not licensed to a community located in whole or in part within a major television market shall be treated in the same manner as a smaller market television broadcast station.

(d) Any community unit operating in a community to which a 100-watt or higher power translator is located within the predicted Grade B signal contour of the television broadcast station that the translator station retransmits, and which translator is carried by the community unit shall, upon request of such translator station licensee or permittee, delete the duplicating network programming of any television broadcast station whose reference point (*See* Section 76.53) is more than 55 miles from the community of the community unit.

(e) Any community unit which operates in a community located in whole or in part within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any major market television broadcast station whose reference point (*See* Section 76.53) is also within 55 miles of the community of the community unit.

(f) A community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community pursuant to Section 76.54.

NOTE: With respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority of shall be that geographic area agreed upon between the network and the television station. In no event shall such rights exceed the area within which the television station may acquire broadcast territorial exclusivity rights as defined in Section 73.658(m), except that small market television stations shall be entitled to a secondary protection zone of 20 additional miles.

Section 76.93 ***Parties entitled to network non - duplication protection***

(a) Television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to Section 76.92 in accordance with the contractual provisions of the network-affiliate agreement.

Section 76.94 ***Notification***

(a) In order to exercise non-duplication rights pursuant to Section 76.92, television stations shall notify each cable television system operator of the non-duplication sought in accordance with the requirements of this Section. Non-duplication protection notices shall include the following information:

1. The name and address of the party requesting non-duplication protection and the television broadcast station holding the non-duplication right;

2. The name of the program or series (including specific episodes where necessary) for which protection is sought;

3. The dates on which protection is to begin and end.

(b) Broadcasters entering into contracts providing for network non-duplication protection shall notify affected cable systems within sixty calendar days of the signing of such a contract. A broadcaster shall be entitled to non-duplication protection beginning on the later of:

1. The date specified in its notice to the cable television system; or

2. The first day of the calendar week (Sunday-Saturday) that begins 60 days after the cable television system receives notice from the broadcaster;

(c) In determining which programs must be deleted from a television signal, a cable television system operator may rely on information from any of the following sources published or otherwise made available.

1. Newspapers or magazines of general circulation;

2. A television station whose programs may be subject to deletion. If a cable television system asks a television station for information about its program schedule, the television station shall answer the request:

(i) Within ten business days following the television station's receipt of the request; or

(ii) Sixty days before the program or programs mentioned in the request for information will be broadcast; whichever comes later.

3. The television station requesting exclusivity.

(d) A television station exercising exclusivity pursuant to Section 76.92 shall provide to the cable system, upon request, an exact copy of those portions of the contracts, such portions to be signed by both the network and the television station, setting forth in full the provisions pertinent to the duration, nature, and extent of the non-duplication terms concerning broadcast signal exhibition to which the parties have agreed.

Section 76.95 ***Exceptions***

The provisions of sections 76.92-76.94 shall not apply to a cable system serving fewer than 1,000 subscribers. Within 60 days following the provision of service to 1,000 subscribers, the operator of each such system shall file a notice to that effect with the Commission, and serve a copy of that notice on every television station that would be entitled to exercise network non-duplication protection against it.

Section 76.97 ***Effective dates.***

The provisions outlined in Sections 76.92-76.95 shall become enforceable on August 18, 1989. The rules in effect on May 18, 1988 will remain operative until August 18, 1989.

5. Section 76 is amended by adding Sections 76.151 to 76.163 to read as follows:

Section 76.151 ***Syndicated program exclusivity: extent of protection.***

(a) Upon receiving notification pursuant to Section 76.155, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below.

NOTE: With respect to each syndicated program, the geographic zone within which the television station is entitled to enforce syndicated exclusivity rights shall be that geographic area agreed upon between the non-network program supplier, producer or distributor and the television station. In no event shall such zone exceed the area within which the television station has acquired broadcast territorial exclusivity rights as defined in Section 73.658 (m).

Section 76.153 ***Parties entitled to syndicated exclusivity.***

(a) Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to Section 76.151 in accordance with the contractual provisions of their syndicated program license agreements, consistent with Section 76.159.

(b) Distributors of syndicated programming shall be entitled to exercise exclusive rights pursuant to Section 76.151 for a period of one year from the initial broadcast syndication licensing of such programming anywhere in the United States; provided, however, that distributors shall not be entitled to exercise such rights in areas in which the programming has already been licensed.

Section 76.155 ***Notification***

(a) In order to exercise exclusivity rights pursuant to Section 76.151, distributors or television stations shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of this section. Syndicated program exclusivity notices shall include the following information:

1. The name and address of the party requesting exclusivity and the television broadcast station or other party holding the exclusive right;

2. The name of the program or series (including specific episodes where necessary) for which exclusivity is sought;

3. The dates on which exclusivity is to begin and end.

(b) Broadcasters entering into contracts containing syndicated exclusivity protection shall notify affected cable systems within sixty calendar days of the signing of such a contract. A broadcaster shall be entitled to exclusivity protection beginning on the later of:

1. The date specified in its notice to the cable television system; or

2. The first day of the calendar week (Sunday-Saturday) that begins 60 days after the cable television system receives notice from the broadcaster;

(c) In determining which programs must be deleted from a television broadcast signal, a cable television system operator may rely on information from any of the following sources published or otherwise made available.

1. Newspapers or magazines of general circulation;

2. A television station whose programs may be subject to deletion. If a cable television system asks a television station for information about its program schedule, the television station shall answer the request:

(i) Within ten business days following the television station's receipt of the request; or

(ii) Sixty days before the program or programs mentioned in the request for information will be broadcast; whichever comes later.

3. The distributor or television station requesting exclusivity.

Section 76.156 ***Exceptions.***

(i) Notwithstanding the requirements of sections 76.151-76.155, a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signal's grade B contour, or when the signal is significantly viewed pursuant to section 76.54 in the cable community.

(ii) The provisions of sections 76.151-76.155 shall not apply to a cable system serving fewer than 1,000 subscribers. Within 60 days following the provision of service to 1,000 subscribers, the operator of each such system shall file a notice to that effect with the Commission, and serve a copy of that notice on every television station that would be entitled to exercise syndicated exclusivity protection against it.

Section 76.157 ***Exclusivity contracts.***

A distributor or television station exercising exclusivity pursuant to Section 76.151 shall provide to the cable system, upon request, an exact copy of those portions of the exclusivity contracts, such portions to be signed by both the distributor and the television station, setting forth in full the provisions pertinent to the duration, nature, and extent of the exclusivity terms concerning broadcast signal exhibition to which the parties have agreed.

Section 76.159 ***Requirements for invocation of protection.***

For a station licensee to be eligible to invoke the provisions of this subpart, it must have a contract or other written indicia that it holds syndicated exclusivity rights for the exhibition of the program in question. Contracts entered on or after August 18, 1988, must contain the following words: "the licensee [or substitute name] shall, by the terms of this contract, be entitled to invoke the protection against duplication of programming imported under the Compulsory Copyright License, as provided in Section 76.151 of the FCC rules." Contracts entered into prior to August 18, 1988, must contain either the foregoing language or a clear and specific reference to the licensee's authority to exercise exclusivity rights as to the specific programming against cable television broadcast

signal carriage by the cable system in question upon the contingency that the government reimposed syndicated exclusivity protection. In the absence of such a specific reference in contracts entered into prior to August 18, 1988, the provisions of these rules may be invoked only if (a) the contract is amended to include the specific language referenced above or (b) a specific written acknowledgement is obtained, from the party from whom the broadcast exhibition rights were obtained that the existing contract was intended, or should now be construed by agreement of the parties, to include such rights. A general acknowledgement by a supplier of exhibition rights that specific contract language was intended to convey rights under these rules will be accepted with respect to all contracts containing that specific language. Nothing in this section shall be construed as a grant of exclusive rights to a broadcaster where such rights are not agreed to by the parties.

Section 76.161 *Substitutions.*

Whenever, pursuant to the requirements of the syndicated exclusivity rules, a community unit is required to delete a television program on a broadcast signal that is permitted to be carried under the Commission's rules, such community unit may, consistent with these rules and the sports blackout rules at 47 C.F.R. Section 76.67, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

Section 76.163 *Effective dates.*

No cable system shall be required to delete programming pursuant to the provisions of Sections 76.151-76.159 prior to August 18, 1989.

* * * * *

FOOTNOTES

[1] Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 85-349, 1 FCC Rcd 864 (1986) (hereinafter cited as *"Must Carry Report and Order"), recon. denied*, 2 FCC Rcd 3593 (1987), *rev' d sub nom. Century Communications Corp. v. FCC*, 835 F. 2d 292 (D.C. Cir. 1987), *clarified*, 837 F. 2d 517 (D.C. Cir. 1988), *cert. denied*, 108 S. Ct. 2014 (1988).

[2] *Must Carry Report and Order*, 1 FCC Rcd at 896. At the time we concluded we should examine these issues, we adopted new must carry rules. Those rules have subsequently been found unconstitutional by the D.C. Circuit. *Century Communications Corp. v. FCC*, 835 F.2d 292 (1987). For the reasons discussed *infra* at para. 63, the absence of must carry makes the need for syndicated exclusivity protection all the more compelling.

[3] These rules are codified at 47 CFR Section 76.92.

[4] *Must Carry Report and Order*, FCC Rcd at 897.

[5] *See Notice of Inquiry in Gen. Dkt. 87-25*, 2 FCC Rcd 2387 (1987) (hereinafter cited as *"Cable Compulsory License Inquiry"*).

[6] 17 U.S.C. Section 101 *et seq.* (1981).

[7] These rules are codified at 47 CFR Section 73.658.

[8] 2 FCC Rcd 2393 (1987) (hereinafter cited as *"Notice"*).

[9] Ninety-two parties, including many small cable systems and broadcast stations, submitted comments or reply comments in this proceeding. Although we do not summarize here the content of each of these filings, we have examined each of these submissions fully and carefully. A list of commenting parties, and the acronyms by which we refer to them in this *Report and Order*, is provided in Appendix A.

[10] *See, e.g., Deregulation of Radio*, 84 FCC 2d968, *recon. granted in part*, 87 FCC 2d 797 (1981), *aff'd sub nom. Office of Communications of the United Church of Christ v. FCC*, 707 F. 2d 1413 (D.C. Cir. 1983), *remanded sub nom. Office of Communications of the United Church Of Christ v. FCC*, 779 F. 2d 702 (D.C. Cir. 1985), responsive *Memorandum Opinion and Order*, 104 FCC 2d 505 (1986); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984) (hereinafter cited as *"Television Deregulation"), recon. denied*, 104 FCC 2d 357 (1986), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981); *Second Report and Order*, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17308 (April 22, 1982); *Third Report and Order*, 48 Fed. Reg. 46791 (Oct. 14, 1983); *Third Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 28292 (June 21, 1983); *Fourth Report and Order*, 95 FCC 2d554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11856 (March 28, 1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1929, *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 765 F. 2d 1186 (D.C. Cir. 1985) (forbearing from imposing traditional common carrier regulation on those common carriers found to lack market power in the domestic interstate telecommunications market).

[11] The courts have consistently recognized that we may change our regulatory course as long as we present a "persuasively reasoned explanation for modifying [our] earlier position that is itself rationally grounded in the evidence before [us]." *Reservation Tel. Coop. v. FCC*, 826 F. 2d 1129, 1130 n. 4 (D.C. Cir. 1987).

[12] For an extensive review of the history of the Commission's signal carriage rules, including those rules regarding syndicated exclusivity, *see Report and Order* in Dkts. 20988 and 21284, 79 FCC 2d 663, 816 (1980). (hereinafter cited as *"1980 Report and Order"*).

[13] *Compare Frontier Broadcasting*, 24 FCC 251 (1958), *recon. denied*, 26 FCC 403, 428 (1959), *with Carter Mountain Transmission Corp.* 32 FCC 459, *aff' d sub. nom. Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 951 (1963).

[14] Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, *First Report and Order*, 38 FCC 683 (1965).

[15] *Id.* at 719.

[16] *Id.* at 715 (emphasis added).

[17] *Second Report and Order* in Docket 14895, 2 FCC 2d 725 (1966) (hereinafter cited as *"Second Report"*).

[18] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, and Inquiry into the Development of Communica-

tions Technology and Services to Formulate Regulatory Policy and Rule Making and/or Legislative Proposals, 36 FCC 2d 141, 148 (hereinafter cited as *"Cable Television Report and Order"), recon. granted*, 36 FCC 2d 326 (1972) (hereinafter cited as *"Reconsideration Order"*).

[19] *See Second Report*, 2 FCC 2d at 798.

[20] In 1968 we issued a *Notice of Proposed Rule Making and Notice of Inquiry* in Docket 18397, 15 FCC 2d 417 (1968) (hereinafter cited as *"Notice of Proposed Rule Making in Dkt. (18397")*, in which we suggested that cable systems in the top 100 local television markets be required to obtain the prior consent of broadcast stations whose signals they wished to carry. For further discussion of the fate of this and subsequent retransmission consent proposals, see *infra* para. 80. In 1970 we issued a *Second Further Notice of Proposed Rule Making* in Docket 18397-A, 24 FCC 2d 580 (1970), in which we proposed that cable systems carrying distant signals be required to delete the commercials carried on the signal and replace them with local stations' commercials. The last document we issued before our 1972 *Cable Television Report and Order, supra* n. 18, was a letter to the Chairman of the Senate Communications Subcommittee. *Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115 (1971). There we presented policies on which we had reached agreement and which were designed to be part of that single, comprehensive regulatory package that we had been seeking to craft since 1968. The issue of program exclusivity was reserved for further study. *See id.* at 116.

[21] 392 U.S. 390 (1968).

[22] The Supreme Court later held that retransmission of distant broadcast signals containing copyrighted material was also not a "performance" of such material to which copyright liability attached. *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

[23] *See infra* n. 24.

[24] *See Commission Proposals for Regulation of Cable Television*, 31 FCC 2d at 116. We discuss the relationship between copyright and communications policy in greater detail, *infra* paras. 125-131.

[25] *See Notice of Proposed Rule Making in Dkt. 18397*, 15 FCC 2d at 432-33.

[26] *See Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115 (1971).

[27] The consensus agreement appears as Appendix D of the *Cable Television Report and Order*, 36 FCC 2d at 284.

[28] Cable operators were generally required to carry the signals of all commercial television stations within thirty-five miles of the system's community, other stations in the same market, and stations significantly viewed in the system's community.

[29] Systems operating in the top 50 television markets were permitted to import distant signals to the extent necessary to make available to their viewers broadcast signals from the three networks and three independent stations. Systems in the second 50 markets were permitted to import distant signals in order to be able to offer to their customers the signals of all three networks and two independents. Cable systems operating in these 100 markets that could fill the complement of network and independent signal carriage through local broadcast signals were allowed to import two "bonus" distant signals from independent stations as long as the signals selected complied with our "leapfrogging" rules. *See infra* n. 30. In the smaller markets, importation was permitted only to bring viewers the three networks' programming and the signal of one independent station. Unless affected local stations could show in an adversary proceeding that the additional competition would adversely affect their ability to serve the public, a cable system in any of these markets could carry any number of distant educational or foreign language television stations. For cable systems operating outside of all television markets, there were no restrictions on the number or type of signals that could be carried.

[30] Our "leapfrogging" rules limited the choice of signals a cable system could import. Under these rules, cable systems had a choice as to the first two "independent" distant signals selected. If they chose from stations operating in the top 25 designated markets, however, the signals had to be taken from the one or two geographically closest to that system. If allowed to import three independent signals, the system had to give preference for its third slot to a UHF station located within two hundred miles. With respect to network affiliates, the cable system could only select the distant signal of either the network affiliate geographically closest to it or the affiliate within the system's state that was geographically closest to it. *See Cable Television Report and Order, 36 FCC 2d at 179.*

[31] *See Cable Television Report and Order*, 36 FCC 2d at 181; *Reconsideration Order*, 36 FCC 2d at 337-38 (same-day exclusivity continued for only Mountain Time Zone broadcasters operating in markets smaller than the top 50 designated markets).

[32] Amendment of Subpart D of Part 76 of the Commission's Rules and Regulations with Respect to Selection of Television Signals for Cable Television Carriage in Docket No. 20487, 57 FCC 2d 625 (1976). Our decision to eliminate this rule was still influenced in part by our conclusion that this change would not adversely affect the broadcast industry as a whole, individual broadcasters or broadcast service to the public. *Id.*

[33] Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations Relative to Adding a New Definition for "Specialty Stations" and "Specialty Format Programming" and Amending the Appropriate Signal Carriage Rules in Docket 20553, 58 FCC 2d 442, modified on recon., 60 FCC 2d 661 (1976).

[34] *See First Report and Order* in Docket 19995, 52 FCC 2d 519 (1975).

[35] General Revision of the Copyright Law, Pub. L. 94-553, codified at 17 U.S.C. 101 *et seq.* (1976) (effective January 1, 1978).

[36] 17 U.S.C. Section 111 (c)(1) (1981).

[37] We discuss this legislation in greater detail, *infra* paras. 125-131.

[38] *Report and Order* in Dockets 20988 and 21284, 79 FCC 2d 663 (1980) identified three factors that caused us to begin this reexamination of our syndicated exclusivity rules:

> (1) the availability of more complete and detailed audience survey data reflecting television viewing patterns in the homes of cable television subscribers, . . . (2) the increasing financial strength of television broadcasters even in the face of increased cable television competition, . . . and (3) the resolution in 1976 of the status of cable television under the copyright laws by passage of the Copyright Revision.

Id. at 670 (footnotes omitted).

[39] *Notice of Inquiry* in Docket 20988, 61 FCC 2d 746 (1976). This *Notice of Inquiry* sought comment on the nature and functioning of the rules and on six proposals for modifying them. The proposals ranged from eliminating the syndicated exclusivity rules entirely to substantially expanding their scope.

[40] *Notice of Inquiry* in Docket 21284, 65 FCC 2d 9 (1977) (hereinafter cited as *"Docket 21284"*).

[41] 71 FCC 2d 951 (1979) (hereinafter cited as *"Syndicated Exclusivity Report"*).

[42] *Report* in Docket 21284, 71 FCC 2d 632 (1979) (hereinafter cited as *"Economic Inquiry Report"*).

[43] *Notice of Proposed Rule Making in Dockets 20988* and *21284*, 71 FCC 2d 1004 (1979) (hereinafter cited as *"1979 Notice of Proposed Rulemaking"*).

[44] The analysis of the purposes and functions of exclusivity is confined to two footnotes which focused solely on the incentives such arrangements create for sellers of such rights, i.e., the program suppliers, to produce more programming; the Report's analysis, however, did not discuss the effects of such arrangements on the competitive market for local television distribution in which the buyers or potential buyers of such rights compete. *See Syndicated Exclusivity Report*, 71 FCC 2d at 956 nn. 11-12.

[45] It predicted that, in the short run, broadcasters would risk the loss of no more than one percent of their current audiences, with the actual loss for most stations likely to be substantially less. *Id.* at 966.

[46] The Commission concluded that for some stations, the long-term loss of their local station audiences could theoretically approach nine percent. *Id.*

[47] *1979 Notice of Proposed Rulemaking*, 71 FCC 2d at 1021.

[48] *See Syndicated Exclusivity Report*, 71 FCC 2d at 965. "However, lest the organization of this Report cause confusion about the locus of our concern, we emphasize that it is not with the impact retention, change, or deletion of a rule may have on the financial fortunes or stability of individual firms or industries but with the impact on service to the public." *Id.*

[49] Retention of a focus on the effects on individual broadcasters and considering the well-being of broadcasting as an industry are two separate matters. Under the former perspective, policies are pursued that tend to favor broadcasters' competitive posture vis-a-vis other media outlets in order to protect broadcasters from the sometimes potent effects of vigorous competition. Under the latter approach, however, the effects of vigorous competition are properly regarded as beneficial, as long as policies are not created that place regulatory constraints on the ability of broadcasters to compete.

[50] *See infra* paras. 125-131.

[51] 79 FCC 2d 663 (1980) (hereinafter cited as *"1980 Report and Order"*).

[52] We note that several parties to this proceeding have seriously criticized the Park study, the major empirical foundation of the 1980 Report and Order. See, e.g., INTV Comments at 16-17; Joint Comments at 15-18. We draw no final conclusions about the strength of this foundation. Because we find that the principal focus of the Park study, the failure of, or harm to, particular broadcasters (as opposed to harm to the competitive process) was not a relevant issue, we conclude that the econometric studies upon which we relied in 1980 should play no role in determining whether syndicated exclusivity rules are in the public interest. Nevertheless, it should be clearly understood that in addition to the deleterious effects on the competitive process, as outlined in the remainder of this paragraph, individual firms that would have benefited from playing by the same rules as their competitors are nevertheless harmed by the absence of syndicated exclusivity protection.

[53] *See infra* para 68.

[54] As recently as 1984 we failed to take any actions on syndicated exclusivity. *See Memorandum Opinion and Order*, 56 RR 2d 625 (1984). Since the Cable Act of 1984 deregulation by Congress it has been increasingly apparent, however, that broadcasters and cable operators are serious competitors. Indeed, we so concluded in our 1986 Order adopting must carry rules. *See Must Carry Report and Order, supra* n. 1. *See also Quincy Cable TV v. FCC*, 768 F. 2d 1434 (D.C. Cir. 1985), cert. denied 106 S. Ct. 2889 (1986); *Century Communications Corp v. FCC, supra* n. 1.

[55] *1980 Report and Order*, 79 FCC 2d 663 (1980).

[56] A bare majority of the Commission voted to rescind syndicated exclusivity rules in 1980 and one Commissioner who voted with the majority expressed serious reservations: "The reason my vote is a concurrence is that I do not fully agree with the heavy implication in the Report and Order that for some years into the future the threat of harm to broadcast television is negligible. Whether this is true depends in large measure on whether cable remains what it has been: primarily a retransmission mechanism. To the extent, however, that cable begins to realize its great potential as a mechanism for providing diverse programming, as well as myriad other services, it may be that our estimates of a maximum 48 percent market penetration and 10 percent audience diversion will prove too modest." *See 1980 Report and Order*, 79 FCC 2d at 899 (separate statement of Commissioner Anne P. Jones.) *See also id.* at 892-97 (Dissenting statements of Commissioners James H. Quello, Robert E. Lee and Abbott Washburn.)

[57] *See 1980 Report and Order*, 79 FCC 2d at 686.

[58] To the extent not all metropolitan areas are wired, it appears to be a function of franchising disputes and delays, rather than the large number of off-air signals available. A number of large metropolitan areas are now in the process of being wired, *e.g.*, Washington, D.C.; New York City.

[59] Federal Communications Commission, "CATV Industry Financial Data," *46th Annual Report / Fiscal Year 1980*, at 112; *Cablevision*, January 14, 1980, at 135; 55 *Television & Cable Factbook*, Cable & Services, at A-40, A-42 (1987).

[60] 1979 *Broadcasting Cable Sourcebook*, at 7; 55 *Television & Cable Factbook*, Cable & Services, at 41 (1987).

[61] 1987 *Nielsen Report on Television*, at 3; *Statistical Abstracts of the United States*, 1985, at 41; and Federal Communications Commission, *46th Annual Report / Fiscal Year 1980*, at 112.

[62] *See* L. Luchter, "Cable Penetration Hits 50.5% In Latest A.C. Nielsen Estimate," *Multichannel News*, November 30, 1987, at 4; *Cablevision*, January 19, 1987, at 64; and National Cable Television Association, *Cable Television Developments*, at 1 (December 1987).

[63] CNN began service in June 1980, USA Cable Network began in April of that year. National Cable Television Association, *Cable Television Developments*, at 8-9.

[64] *Id.*

[65] Liebowitz, Donaldson, Lufkin & Jenrette, "Industry Viewpoint," November 16, 1979, at 20.

[66] *Cablevision*, January 4, 1988, at 64.

[67] *See, e.g.*, J. Dempsey, "Cable Influencing Syndie Deals," *Variety*, January 27, 1988, at 1; K. Mitchell, "Cablers Galloping Into Production," *Variety*, January 13, 1988, at 37; W. Friedman, "Cable May Feast on Glut of Sitcoms," *Cablevision*, January 4, 1988, at 18; P. Ziegler, "NBC in Talks to Produce Series for Disney Channel," *Multichannel News*, December 14, 1987, at 1; P. Ziegler, "MSOs Join To Back Production Company," *Multichannel News*, January 11, 1988, at 1; and D. Narrod, "Cable Operators Use Cash To Buy Systems Move Into Programming," *Multichannel News*, December 28, 1987, at 1.

[68] NCTA President James Mooney has repeatedly emphasized the importance of exclusivity to cable in connection with NCTA's opposition to the "Gore" bill (S. 889), and other legislative attempts to guarantee competing video media access to programming now available only through cable. *See Communications Daily*, April 25, 1988, at 3. He has also noted that program

exclusivity has been an important factor in cable's success, and that it is "increasingly important in an increasingly competitive world." *TV Digest*, April 25, 1988, at 2.

[69] "Mastering the Audience Measurement Muddle," *Cablevision*, March 9, 1981, at 37.

[70] "Web Shares, HUT Levels Drop," *Variety*, December 16, 1981, at 31.

[71] H. Burns, "Viewers Bail Out On Broadcast Nets," *Multichannel News*, November 16, 1987, at 1. This statistic includes a decline of ten percentage points from the previous fall. The magnitude of the network's audience decline was unforeseen by most industry participants and observers. For example, one advertising agency's pessimistic prediction that network prime time shares would drop to 75 percent by the 1989-90 television season turned out to be too rosy. "New JWT Unit Calls The Shots on How the Webs Will Swim Against 'New Waves' by 1990," *Variety*, September 24, 1980, at 49. By mid-December 1987, the three-network prime time audience share was estimated by a different source to have dropped to 68 percent. L. Luchter, "Basic Cable Nets *See* Jumps in Ratings, Subs, Ad Dollars," *Multichannel News*, December 28, 1987, at 5.

[72] "Cable and Broadcast Audience Shares," *Multichannel News*, June 8, 1987, at 24. Network viewing in pay cable households was even lower at 47 percent with satellite distributed cable services accounting for 45 percent of weekly viewing. The share measurement methodology employed results in a total of all shares in excess of 100 per cent. This occurs because in multi-set households more than one category of program may be being viewed; however, the household is only counted once for ratings calculation purposes.

[73] Federal Communications Commission. "CATV Industry Financial Data," *46th Annual Report / Fiscal Year 1980*, at 112; and "Mastering the Audience Measurement Muddle," *Cablevision*, March 9, 1981, at 28, 32.

[74] "Mastering the Audience Measurement Muddle," *supra* n. 73, at 28.

[75] Federal Communications Commission, "Television Financial Data --Industry Totals, 1975-1979, " *46th Annual Report / Fiscal Year 1980*, at 100.

[76] Paul Kagan Associates, Inc., *1987 Cable TV Investor*, at 12; L. Luchter "Basic Cable Nets *See* Jumps in Ratings, Subs, Ad Dollars," *Multichannel News*, December 28, 1987, at 5.

[77] Coen, McCann-Erickson, *The Outlook for 1988 Advertising Expenditures*, December 7, 1987.

[78] Paul Kagan Associates, Inc., *1987 Cable TV Investor*. The cable industry itself expects to achieve 65% penetration in the next 5 years. *See Broadcasting Magazine* May 2, 1988, at 39.

[79] Indeed, one of the primary benefits of permitting the importation of distant signals in 1980 was to allow cable consumers *greater* programming choice. Because so little nonbroadcast material was available, broadcast signals were indispensable; programming from such signals made up a large fraction of the average cable system's service. Today, the average cable system carries three distant independent signals. Given the wealth of cable programming available, the goal of increased program diversity --important in 1980 and today -- need not be accomplished by relying on duplicating distant broadcast signals.

[80] For instance, 11 cable services began operation in 1987 and 13 more are expected in 1988, most notably, The Turner Network Television (TNT).

[81] *See Must Carry Report and Order*, 1 FCC Rcd at 866. For this reason, the Commission's second purpose in repealing syndicated exclusivity in 1980--to promote the growth of cable--is no longer a factor in our cost-benefit analysis. The foregoing analysis clearly demonstrates that cable is a healthy competitor to broadcasting and is capable of competing without a regulatory "safe harbor."

[82] *See Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985).

[83] *See infra* paras. 34-44.

[84] Comments of the National Cable Television Ass'n, Inc., at 68 (hereinafter cited as "NCTA Comments).

[85] *Id.* at 70.

[86] Comments of the Association of Independent Television Stations, Inc., at 32 (hereinafter cited as "INTV Comments").

[87] Comments of the Community Antenna Television Ass'n, Inc., at i (hereinafter cited as "CATA Comments").

[88] Comments of Times Mirror Co., at 18, 20 (hereinafter cited as "Times Mirror Comments").

[89] Comments of the Motion Picture Ass'n of America, Inc., at 43 (hereinafter cited as "MPAA Comments").

[90] Comments of the TVX Broadcast Group, at 1 (hereinafter cited as "TVX Comments").

[91] The information submitted by commenters on both sides of this issue reinforces our conclusion that duplication of syndicated programming is very substantial.

[92] The "benefits" of duplication are discussed *infra* at paras. 45-47.

[93] *See, e.g.*, NCTA Comments, at 45-55.

[94] "Audience diversion" is that audience viewing duplicating programming on cable that would otherwise watch the same programming on the local signal. We also note that, while not prohibited from so doing by our *ex parte* rules, 47 C.F.R. section 1.1200 *et seq.*, we have not, in reaching our decision today, relied upon the following *ex parte* filings: Letter from Meredith Corporation (by Haley, Bader & Potts) to H. Walker Feaster, dated May 3, 1988; Letter from Cole, Raywid & Braverman to Chairman Dennis Patrick, dated May 10, 1988; Letter from United Video Inc. to Chairman Dennis Patrick, dated May 9, 1988; Letter from Tribune Broadcasting Co. (by Schnader, Harrison, Segal & Lewis) to Chairman Dennis Patrick, dated May 10, 1988; Letter from Tribune Broadcasting Company to Chairman Dennis R. Patrick, dated May 11, 1988; Letter from Haley, Bader & Potts to Chairman Dennis Patrick, dated May 11, 1988; Letters from James P. Mooney, NCTA to Chairman Dennis Patrick dated May 10, 1988 and May 11, 1988.

[95] *See, e.g.*, Joint Comments of Broadcaster Respondents, at Attachment A (hereinafter cited as "Broadcaster Respondent Comments"); INTV Comments, Appendix B; MPAA Comments, at Appendix E; Capital Cities/ABC Comments, at Exhibit A. These raw figures surely represent substantial diversion, although they may be overstated to some degree because they fail to take into account the fact that some of the audience reflected in the cable ratings would not be captured by the local broadcaster. "Audience enhancement" is that audience viewing duplicate programming on cable that would not watch the local broadcast signal, even if cable duplication were not available.

[96] *See* INTV Comments, at Appendix C, Chart 1; letter dated February 11, 1988, from INTV to Commission's Acting Secretary (hereinafter cited as a "INTV Letter). *See also* TVX Comments, at Appendix 1, Att. 1; Appendix 2, Att. 11; Appendix 3, Att. 11; Appendix 4, Att. 11; Appendix 5, Att. 11; Broadcaster Respondents Comments, at Attachment A; Arch Comments, at Attachment; Smaller Market UHF Stations' Comments, at 14; The 97 Comments, at Appendix E; and Sarkes Tarzian Comments.

[97] NCTA Comments, at 57-61.

[98] MPAA Reply Comments, at 24-25.

[99] *See* INTV Comments, at Appendix B.

[100] *See* MPAA Comments, at Appendix E.

[101] In any event, under the original rules and in the rules adopted herein as well, local broadcasters cannot enforce syndicated exclusivity rights against those signals which are in fact available off-air. *See also infra* para 47.

[102] NCTA Reply Comments, at 3-9.

[103] Statistical errors have not been confined to one side of this debate. NCTA itself makes an elementary, but fundamental, error in its discussion of broadcast station profitability when it compares mean profitability in one year with median profitability in another. The difference is a substantial one and undermines the point NCTA is attempting to make there. *See* NCTA Comments, at Table 7; NAB Reply Comments, at 11-13.

[104] Although we recognize that the mere fact that an imported signal gains ratings points is not, ipso facto, evidence that the local broadcaster has lost those same ratings points, there is considerable evidence of diversion, as we have already described. *See supra* para 32; NCTA Comments, at 28.

[105] *See supra* para. 34; *see also* Cap Cities/ABC Comments, at Exhibit A; INTV Letter.

[106] INTV Comments, at Appendix C.

[107] NCTA Reply Comments, at Appendix: "Analysis of Data Submitted by MPAA, NAB and INTV," at 9-15.

[108] Our conclusions are not altered by the fact that local broadcasters may suffer "audience fractionalization"; that is, audiences that would otherwise watch the local broadcast signal who may now choose to watch the programming a cable operator *substitutes* for a duplicating signal. Under fair competitive rules, fractionalization will reflect audience choices, leading to a more optimal mix of programming being available to viewers.

[109] *See supra* para. 29.

[110] The purchase of the rights to show NFL football games on ESPN undoubtedly created a situation in which some spot advertising that would have been sold to TV stations was instead sold to cable TV.

[111] MPAA Comments, at 51.

[112] *See infra* para 56.

[113] *See 1980 Report and Order*, 79 FCC 2d at 750-51.

[114] See MPAA Comments, at 28-35; INTV Comments, at 18-22.

[115] The Commission has addressed the importance of maximizing viewers' choices on numerous occasions. *See, e.g., Must Carry Report and Order*, FCC Rcd at 879, for a recent example.

[116] Virtually all opposing commenters fall into this category. *See, e.g.*, NCTA comments at 61-78; Comments of United Video, Inc. at 3-6 (hereinafter cited as "United Video Comments") *See generally* of Connecticut Cable Television Association; CATA Comments. In addition, we have received a number of letters making the same point.

[117] *See supra* para. 45.

[118] 55 *Television and Cable Factbook*, Cable and Services, at A-14 (1987).

[119] *Communications Daily*, April 27, 1988, at p. 4.

[120] NCTA itself has pointed out, in our signal carriage proceedings, that the increased penetration of VCR's has diminished, if not eliminated, the value of time diversity. To wit: "The growing proliferation of video cassette recorders, along with the common practice of many noncommercial stations of repeating featured programming at different times during the week, more than satisfies any public interest in "time-shifting" that might be served by duplicate carriage." NCTA Comments in MM Docket 85-349, at 31 n. 50.

[121] *See infra* paras. 77-78.

[122] As explained below, in our view reasonable exclusivity in the distribution of programming is an appropriate competitive tool for *any* distributor of video programming, including cable. For example, a senior vice president of HBO has noted that "HBO never licenses the rights to an off-HBO program for exhibition when that program is airing on HBO. 'When we license off-HBO product, it's always for way beyond our window,' she said. 'In the post-VCR universe, original programs are our only exclusive product.'" "Cable-Syndication's Two-Way Pipeline", *Broadcasting Magazine*, Feb. 22, 1988, at 160, 162. In addition, NCTA president James Mooney has indicated that program exclusivity is "increasingly important in an increasingly competitive world." *Communications Daily*, April 25, 1988, at 3. *See also infra* para. 52.

[123] The importance of exclusive control of programming has been recently affirmed by the Commission in its scrambling reports. *See Report* in Gen. Docket 86-336, 2 FCC Rcd 1669, paras. 59, 64 (1987). *See also* Capital Cities/ABC Comments, at 11-20, on the importance of exclusivity [for all competitors].

[124] We have concluded elsewhere that substantial reliance on market forces to ensure the public interest is appropriate in competitive settings. *See, e.g., Television Deregulation*, *supra* n. 10.

[125] Competition is most effective when a sufficient number of competitors or potential competitors exists to keep any one supplier from charging unreasonably high prices and when there are no "externalities" or competitive market failures that lead market prices to deviate substantially from socially efficient prices. *See* F. Bator, "The Anatomy of Market Failure," 72 Q. J. of Econ. 351 (1958).

[126] *See* J. Haring, "Implications of Asymmetric Regulation for Competition Policy Analysis" FCC, OPP Working Paper 14 (December 1984).

[127] *See, e.g.*, NCTA Comments; NCTA Reply Comments; CATA Comments; Comments of Turner Broadcasting System, Inc. (hereinafter cited as "Turner Comments"); Comments of Time Inc. (hereinafter cited as "Time Comments"); Connecticut Cable TV Association Comments.

[128] *See supra* n. 127. NCTA and others also argue that valuable time diversity would be lost. We have discussed the significance of this claim already, *supra* para. 46, and have determined that the benefits of true program diversity that could accrue if syndicated exclusivity were reimposed outweigh any benefits of time diversity that occur in the absence thereof.

[129] CATA comments, at 3; Comments of Cole, Raywid and Braverman, at 25 (hereinafter cited as "Cole/Raywid Comments").

[130] Turner Comments, at iv.

[131] *See* J. Minasian, "Television Pricing and the Theory of Public Goods," 7 J. of Law and Econ. 71 (1984). *See also Malrite T. V. of N. Y. v. FCC.*, 652 F. 2d 1140, 1151-52 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[132] Ironically, Minasian's article, *supra* n. 131, was cited in the *1980 Report and Order*, 79 FCC 2d at 749, but without mentioning his conclusion concerning the need to finance the supply of public goods and the necessity of positive prices and excluding potential recipients when the goods are provided privately. Even Samuelson, Minasian's opponent in a spirited debate, agrees with this point. The point he stresses is that the choice of institutional arrangements to ensure the provision of public goods is a difficult one. *See* P. Samuelson, "Public Goods and Subscription TV: Correction of the Record," 7 *J. of Law and Econ.* 81 (1984).

[133] "Efficient" is defined in terms of the quantity of viewing that will occur if the price equals the marginal cost, namely, zero.

[134] For a more detailed treatment of these points, *see* Owen, Beebe and Manning, *Television Economics*, Chs. 1&3 (1974); Noll, Peck and McGowan, *Economic Aspects of Television Regulation*, Ch.2 (1973).

[135] It is logically possible that the fees paid to the program producer through the compulsory license will exactly match the value of the program to cable viewers; but the compulsory license was not designed to achieve this goal, and, as a practical matter, it has not (*see, e.g.*, MPAA Comments in Docket 87-25 (*Compulsory Copyright License Inquiry)*, attachment A, at 38-39).

[136] *See supra* n. 122.

[137] *See, e.g.*, Capital Cities/ABC Comments, at 15; MPAA Comments, at 62; Group W Comments, at 11.

[138] HBO has been reported to be near an exclusive contract with Twentieth Century Fox for rights to movies. Showtime also buys some movies on an exclusive basis in order to " . . . differentiate Showtime from HBO" L. Landro, "HBO Is Near an Accord With Fox To Buy Exclusive Pay-TV Rights," *Wall Street Journal*, May 6, 1988, at 26.

[139] This is the case because some viewers wishing to watch a program that has been promoted by their local station may be indifferent as to which station they view it on. *See, e.g.*, Group W Comments, at 11.

[140] For example, they often serve a large number of viewers who either do not subscribe or do not have access to cable.

[141] Program exclusivity is one of several types of vertical arrangements that antitrust economists and the courts once regarded with concern. However, the modern theory of vertical contracts, and increasingly court decisions, recognize that vertical contracts should generally be presumed to confer consumer benefits in industries that are reasonably competitive. A leading work is Robert Bork, *The Antitrust Paradox*, 299-309 (Basic Books, 1978). *See also* "Impact Evaluations of Federal Trade Commission Vertical Restraints Cases", Federal Trade Commission Report, August 1984; *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977), *on remand*, 461 F. Supp. 1046 (N.D. Cal. 1978), *aff' d*, 694 F. 2d 1132 (9th Cir. 1982); *Business Electronics Corp. v. Sharp Electronics Corp*, 56 U.S.L.W. 4387, 4393 (May 2, 1988).

[142] Indeed, in its 1980 Network Inquiry, the Commission's Network Inquiry Special Staff found that "the network program supply, syndicated program supply,and syndicated program distribution markets are competitively structured." Federal Communications Commission Network Inquiry Special Staff, II *Report on New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* 787 (1980).

[143] Cable penetration is over 50% of television households. *See supra* n.62. It follows that nearly one-half of all households receive broadcast television service, but do not subscribe to cable. *See supra* para 26.

[144] *See infra* paras. 56-59.

[145] *See supra* para. 51 and associated footnotes.

[146] Diversion of viewers to duplicative signals reduces broadcasters' abilities to compete for programming. *See supra* para. 41.

[147] This will be the case as long as the price paid for these signals via the compulsory copyright fee is less than the market price. This will, in general, be the case. If the copyright fee were above the market price, the signal would not, of course, be imported.

[148] When the Cosby show was sold first to superstation WOR, local broadcasters indicated they would pay less than they otherwise would have. Whether this has occurred is not easily determined, since it requires knowledge of the price that would have been paid . . . in the presence of exclusivity. For information on some prices paid for Cosby, *see* "The 'Cosby' Numbers in Syndication", *Broadcasting Magazine*, Apr. 27, 1987, at 58.

[149] Indeed, in some cases the program might not be offered to a station that is carried to other markets at all. Some sixteen independent television stations have been barred from bidding for local market rights of ESPN's National Football League games, because they are retransmitted into areas where ESPN intends to market those games on an exclusive basis. *See* INTV Comments, at Appendix D.

[150] *See infra* n.265.

[151] Alternative responses to the imposition of syndicated exclusivity rules are explored in detail by various commenters. *See, e.g.*, INTV Comments, at 50-52; NAB Reply Comments, at 22-24; MPAA Comments, at 63-69; Capital Cities/ABC Reply Comments, at 11-19.

[152] *See* MPAA Comments, at 58.

[153] In fact, if the commenters opposed to syndicated exclusivity were correct that duplicating progamming causes little harm to broadcasters and is higly valued by cable viewers, then this option would be preferred. Local broadcasters would not be willing to pay for exclusivity and cable systems and/or superstations would be able to obtain nonexclusive rights in the same programming. *See* Capital Cities/ABC Comments, at 17; Comments of the Satellite Broadcasting and Communications Ass'n, at 6 (hereinafter cited as "SBCA Comments").

[154] It is tempting to argue that similar negotiations could take place between cable operators and broadcasters to circumvent the absence of syndicated exclusivity under our current rules. For example, a broadcaster could offer to pay a cable operator not to show a program that duplicates the broadcaster's programming. Whatever the economic benefits of such a negotiation, however, it would almost surely run afoul of the antitrust laws, which look with considerable disfavor on agreements among horizontal competitors that appear to limit competition or reduce options for consumers. With syndicated exclusivity rules, in contrast, negotiations among cable operators and broadcasters would have the effect of *expanding* the number of outlets showing a program and therefore would not cause antitrust difficulties. *See Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359 (9th Cir. 1986).

[155] Unlike broadcasters, a cable system operator will be concerned with the value of the program to the viewer, since the operator is concerned about the demand for cable access, not just advertising exposure.

[156] Tempo Comments, at 7.

[157] Letter dated April 18, 1988 from United Video to Chairman Dennis R. Patrick.

[158] *See, e.g.*, NCTA Comments, at 66 n. 116; Comments of the Coalition of Small Cable TV System Operators, at 3 (hereinafter cited as "Coalition" Comments; Time Comments at 24; Cole-Raywid Comments, at 33-34; Comments; of Centel Communications Co., at 8-9 (hereinafter cited as "Centel Comments) United Video Comments, at Exhibit 6.

[159] Similarly, commenters offer no basis for their labor cost estimates, which vary widely.

[160] Jeffrey Krause, "Technical Approaches to Implementing Syndicated Exclusivity" at 12-13 (MPAA Feb. 12, 1988) (hereinafter cited as "MPAA February Filing").

[161] *Id.* at 16-18.

[162] These systems serve approximately 75% of all subscribers. *Id.* at 12-13.

[163] "Channelmatic Introduces Ad-Insertion Products", *Multichannel News*, Feb. 8, 1988, at 29.

[164] Letter dated Feb. 23, 1988 from James B. Hedlund to Lisa Hook, Legal Assistant.

[165] We acknowledge that there may occasionally arise problems with decentralized automatic switching, particularly as a result of a sport event or other special programming "running-over" its allotted time. We expect cable operators will be able to accommodate such instances where customers demand uninterrupted programming. For example, while the exact length of a sports event is not known, its scheduling, and the possibility of "over-run" are. Thus, the cable operator can plan for such eventualities.

[166] *See* MPAA Comments, at 84.

[167] MPAA estimates total equipment costs (for a system carrying three distant signals) at $3,045.90 and labor costs at $1,560 per year. *See* MPAA February Filing.

[168] We also note that Tempo has suggested that a carrier like Tempo could perform deletion and insertion services in such a way as to reduce compliance costs substantially. Tempo Comments, at 7-8.

[169] Tempo Comments, at 6-7.

[170] *Id.; see also supra* n. 165.

[171] *See* 47 C.F.R. 76.151 (1979) (repealed).

[172] Because the 1972 rules were adopted essentially intact from the industry "consensus" agreement there was no discussion or rationale presented for the specific provisions of those rules.

[173] For example, a major movie may be an important tool in attracting an audience to a station. Typically, a major movie will be heavily promoted during the period prior to its showing. If the same movie is imported just prior to the planned showing, not only may a substantial portion of the audience be lost, but the promotional expenditures are to some degree wasted. *See* INTV Comments, at 63 n.88.

[174] INTV Comments, at 64; MPAA Comments, at 77.

[175] *See, e.g.*, Time Comments, at 23.

[176] Network Inquiry Special Staff, II *New Television Networks : Entry, Jurisdiction, Ownership and Regulation* 787 (1980).

[177] *See* R. W. Kenney and B. Klein, "The Economics of Block Booking" 26 J. of Law and Econ. 497, 538 (1983); O. E. Williamson, *The Economic Institutions of Capitalism* 19, 372 (Free Press, 1985). *See also* G. Stigler, "A Note on Block Booking", *reprinted in* G. Stigler, *The Organization of Industry* 165 (Irwin, 1968).

[178] *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345, 94 FCC 2d 1019, 1072-87 (1983).

[179] Obviously, in the unlikely event that we are presented in the future with evidence of restrictive block booking or other warehousing, we can revisit and amend our rule.

[180] *See generally* Coalition Comments; CATA Comments.

[181] *See generally supra* paras. 76-77.

[182] *See* MPAA Comments, at 78; and INTV Comments, at 64.

[183] *See supra* para 78, (explaining those circumstances where cable operators may negotiate for exhibition rights with local broadcasters who hold syndicated exclusivity rights against imported programming). In general, we believe that the broadcasters, as opposed to the program suppliers, will be the better judges of whether or not to enter into such arrangements with local cable operators. We note, in addition, that broadcasters may obtain exclusivity as against any other broadcast television signal, including those emanating from low power television, translators and boosters, as well as from other full power stations.

[184] Of course, in situations in which the program supplier grants exclusive distribution rights to a broadcaster outright, without reserving any enforcement ability, the supplier would, as a contractual matter, be unable to invoke our exclusivity rules in any event, for it would have no rights to protect.

[185] *See infra* section III.

[186] *See infra* at para. 166.

[187] For another reason for this limitation, *see infra* n.284. *See also* the discussion of warehousing in connection with the new network non-duplication rules we are adopting today. *Supra* para 92. One additional aspect of this general principle should be noted. Although we are convinced that broadcasters normally are unlikely to purchase significantly more exclusivity than they can use, a broadcaster could conceivably thwart the compulsory license scheme by obtaining broad syndicated exclusivity rights enforceable against distant cable operators, thereby foreclosing distribution of video product beyond the area the broadcaster actually intends to serve. By obtaining broad exclusivity, and then requiring distant cable systems to receive consent before retransmission, broadcasters could use such exclusivity to extract retransmission payments in addition to those payable under the regulation of the Copyright Royalty Tribunal. Therefore, the permissible geographic extent of syndicated exclusivity available to a broadcaster as against cable operators will not be allowed to exceed the extent of the territorial exclusivity purchased as against other broadcasters. By this limitation we ensure that any rights purchased bespeak an intention to serve the area in question, and not simply to extort additional payments from cable operators.

[188] The following four paragraphs deal with syndicated exclusivity contracts signed after this *Order* goes into effect. Existing contracts are treated below in paras. 101-105.

[189] NAB Comments, at 23-24.

[190] Several commenters suggest that clearinghouses for general programming information might be formed to carry out the necessary notification procedures and record keeping. *See, e.g.*, INTV Comments, at 67. While we offer no opinion on the likelihood of the development of such services, we note that a wide range of information services and data bases have been created to serve a variety of business, government, and other organizational needs.

[191] Tempo Comments, at 8, suggests that 60 days would be the minimum time needed for a cable system to respond effectively to the need to delete a distant signal. *See also* INTV Comments, at 67; NAB Comments, at 23.

[192] MPAA Comments, at 86.

[193] Letter dated Feb. 26, 1988 from INTV to Chairman Dennis R. Patrick.

[194] Letter dated March 11, 1988 from Cole/Raywid to Dennis R. Patrick.

[195] Virtually every cable commenter raises this concern. *See generally* CATA Comments; NCTA Comments. We note that we have seen no systematic evidence as to the proportion of existing contracts that contains syndicated exclusivity protection.

[196] *See generally* Turner Comments; Turner Reply Comments. *See also* letters dated Mar. 7, Apr. 10, Apr. 20, 1988 from Turner to Chairman Dennis R. Patrick.

[197] *See Malrite TV v. U. S. FCC*, 652 F. 2d 1140, 1150 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (*citing General Telephone Co. of the Southwest v. United States*, 449 F. 2d 846, 863-64 (5th Cir. 1971)).

[198] We do recognize that this option is not and has not been available in the case of that small number of existing contracts that were signed before 1980.

[199] We also note, however, that Turner has charged national advertising rates.

[200] MPAA Comments, at 81. *See generally* Major League Baseball Comments.

[201] Major League Baseball Comments, at 2.

[202] *See* 47 C.F.R. Section 76.67(d). *See also* 47 CFR Section 76.61(b)(2)(repealed 1981).

[203] MPAA Comments, at 88.

[204] If Congress adopts a regime of full copyright liability for syndicated programming, then copyright holders would have complete control over the distribution of programming. Under that regime a separate syndicated exclusivity rule would appear to be superfluous.

The Corporation for Public Broadcasting (CPB) and the National Association of Public Television Stations (NAPTS) have requested in Joint Comments that noncommercial educational stations receive syndicated exclusivity protection. Because they have never been covered by such rules, and because our *Notice* in this docket did not discuss their inclusion, we will not include noncommercial educational stations in the coverage of our rules at this time. We will, however, discuss inclusion of these and other broadcasters not yet entitled to avail themselves of these rules in the *Further Notice of Proposed Rulemaking* to be issued in this docket. *See infra* paras. 163-170.

[205] 47 CFR sections 76.92-76.99.

[206] *See Notice*, 2 FCC Rcd at 2400.

[207] They do, of course, protect network revenues, since they provide an essential underpinning for the network-affiliate relationship.

[208] *See generally Notice*, 2 FCC Rcd at 2400-01. We emphasize that, under this iteration of network nonduplication protection, local affiliates must negotiate for program exclusivity in their program contracts, a change from the existing rules, which essentially grant exclusivity by regulation to network affiliates. *See* 47 CFR Section 76.92.

[209] *See supra* paras. 7-23.

[210] *Cable Television Report and Order*, FCC 2d at 141.

[211] *Reconsideration Order*, 36 FCC 2d at 338.

[212] *Second Report and Order in Docket 19995*, 54 FCC 2d 229 (1975).

[213] *See* Comments of CBS Television Network Affiliates Association, at 7-8 (hereinafter cited as "CBS Affiliates Comments").

[214] *See 1979 Notice of Proposed Rule Making*, 71 FCC 2d at 1006.

[215] NBC Comments, at 11; CBS Affiliates Comments, at 3.

[216] CBS also notes the importance of the "lead in" phenomenon here. If a program is duplicated, "lead-in" may be lost. *See* CBS Affiliates Comments, at 6. "[L]ead in" refers to the tendency of an audience during one period to remain tuned to a station through the advertising and public service announcements that follow the program itself. The viewership of any program is thus influenced by the viewership of the preceding program.

[217] There are currently nine network affiliate broadcast signals being distributed by satellite: three each by Netlink USA, Satellite Broadcast Networks, and Cancom (a Canadian firm). Netlink makes its signals available to home dish owners and cable systems, while SBN's principal market is home dish owners. Clearly, however, each has the ability to serve cable systems as well as others. *See Broadcasting Magazine*, Nov. 30, 1987, at 48.

[218] NBC Comments, at 10,18.

[219] CBS Comments, at 14; *see also supra* para. 47.

[220] *See, e.g.*, Capital Cities/ABC Comments, at 33.

[221] *See supra* para. 95.

[222] *See, e.g.*, ABC Affiliates' Reply Comments, at 33.

[223] CBS Comments, at 6.

[224] *See* Owen, Beebe, and Manning, *Television Economics* 18-19 (1974). They note: "A network can exploit transaction economies both in advertising and in program distribution. If there are X stations and Y national advertisers, there must be X times Y contracts written in the absence of networks or collective station representation. If the X stations affiliate with a network, then there are X+Y contracts. For realistic values of X and Y, networking cuts costs." *Id.* at 19. We note that while networking normally involves the simultaneous transmission of programming to multiple outlets, non-simultaneousexhibition is also imaginable within a network context. *See infra* n. 228; *see also supra* para. 122.

[225] Broadcaster Respondent Comments, at 15.

[226] *See* CBS Comments, at 15-16.

[227] *See* NBC Comments, at 16-17; *see also supra* n.217.

[228] Because most network programming is distributed nationally the same day, and at the same time within time zones (in sharp contrast to most syndicated programming, which may air at widely divergent times), protection beyond one day may at present appear superfluous. However, as already noted, *supra* n. 224, networking need not always consist solely of simultaneous exhibition. *See* ABC/Capital Cities Comments, at 31, to the effect that in principle there is no reason to limit network non-duplication protection to any particular time period. Thus, we have decided to increase the scope of the rule to allow it to accommodate decisions by networks to permit the non-simultaneousexhibition of network programs.

[229] NBC Comments, at 21.

[230] According to NBC, fewer than 800,000 TV Households do not receive its signal. *Id.*

[231] *See Report, In the Matter of Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, Gen. Docket 86-366, 62 RR 2d 687, 746 (1987).

[232] *See supra* para. 94.

[233] Capital Cities/ABC Comments, at 33.

[234] Coalition Comments, at 6-8.

[235] CBS Comments, at 24.

[236] See supra para. 95, wherein we make the same provision with regard to syndicated exclusivity.

[237] We note that although it appears to be a very unlikely eventuality, a network will not be required to offer non-duplication rights as a part of its affiliate contract.

[238] *See supra* paras. 97-99.

[239] *See, e.g.*, ABC Affiliates Reply Comments, at 33.

[240] For a discussion of the current standard, *see Memorandum Opinion and Order*, 64 FCC 2d 589 (1977); *and MO&O and Order & Show Cause*, 68 FCC 2d 1271 (1978).

[241] *See e.g., Community Telecommunications Inc. d/b/a Scotts Bluff Cable TV*, 95 FCC 2d 239 (1983), *modified*, 100 FCC 2d 1261 (1985).

[242] *See supra* paras. 42-44.

[243] We note that cable systems may continue to avail themselves of the standard waiver procedures provided in the Communications Act.

[244] *See infra, Ordering Clauses* at para. 178.

[245] We also point out that we are deleting Sections 76.92(e), 76.94(b)(1), 76.94(b)(2), 76.95(a), 76.95(b), 76.95(d), and 76.99. These provisions are superceded by the changes we are making in the rules by this *Order*, and so are no longer necessary.

[246] Because most of the commenters focused on our legal authority to extend our exclusivity provisions to syndicated programming, our discussion here will address primarily the syndicated exclusivity rule provisions. We conclude, however, that we possess ample legal authority to amend our exclusivity provisions with respect to network programming, as well as to extend our existing exclusivity protection to include syndicated programming.

[247] *See infra* paras. 150-155.

[248] *See* Cole/Raywid Comments, at 25.

[249] MPAA Comments, at 38-39. We have discussed already why our rules will not have the practical effect of eliminating carriage of regional or national distant signals that Cole/Raywid and others predict. *See supra* n. 248. Further, we note that our contemplation herein that a cable system may negotiate with local broadcasters to forebear from exercising its syndicated exclusivity rights is completely dissimilar from requiring cable systems to negotiate with distant signal broadcasters for retransmission consent. The retransmission of distant signals continues to be possible *without* the consent of the broadcaster of that signal under the rules we adopt today.

[250] The retransmission consent proposal addressed by the court in *Malrite* had been suggested by NTIA, then directed by Henry Geller. Subsequently, in the course of rejecting a petition by Geller to reenact syndicated exclusivity provisions, the Commission reiterated its earlier conclusion that retransmission consent, Geller's ultimate objective, was beyond the Commission's jurisdiction. *See Syndicated Program Exclusivity and Sports Telecasts*, 56 RR2d 625, 629(1984). Having also decided not to revisit its determination to repeal the syndicated exclusivity provisions, the Commission noted that any adjustment in royalty rates as a consequence of the rules' deletion properly should be sought from the Copyright Royalty Tribunal. The Commission did not, however, equate syndicated exclusivity rules with a retransmission consent proposal barred by the Copyright Act. Nor did the Commission conclude that it was without authority to adopt syndicated exclusivity rules if the public interest so required. *See also infra* note 256.

[251] *Cable Television Report and Order*, 36 FCC 2d at 166 n.34. This was only one of several occasions during the years that copyright legislation was pending that we expressed our belief that detailed regulation of cable television signal carriage, regulation reflected by rules governing program exclusivity, leap frogging and must carry, should be left to us. *See, e.g.*, Letter dated March 11, 1970 from Chairman Burch to Senator Magnuson, Chairman of the Senate Commerce Committee, *quoted* in INTV Comments Appendix E., at 7; *Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115, 116 (1971); Letter dated January 26, 1972 from Chairman Burch to Senator McClellan, Chairman of the Senate Subcommittee on Patents, Trademarks and Copyright, *reprinted* as Appendix E of the *Cable Television Report and Order*, 36 FCC 2d at 286.

[252] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

[253] The Copyright Office, Library of Congress, which is charged with administering various provisions of The Copyright Act, also recognizes this interplay: "The cable television copyright compulsory license mechanism is premised on a bifurcation of responsibilities under communications and copyright law. Under this mechanism, the FCC controls signal distribution by cable systems as part of a national allocation policy and protects some exclusive rights as part of this policy. At the same time, the copyright law prescribes the degree and nature of cable operators' liability for the use of copyrighted programming that the FCC rules permit them to retransmit." *Compulsory License for Cable Systems*, 50 Fed. Reg. 9270 (March 7, 1985).

[254] H.R. Rep. No. 1476, *infra* n. 252 (emphasis added).

[255] We also note that the court, in *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979), did not suggest that the Copyright Act of 1976 affected our general authority to enact syndicated exclusivity rules. In 1972, the Commission had proposed syndicated exclusivity provisions based on " . . . what from its viewpoint the public interest demanded in several aspects of cable television policy." *Id.* at 979. The court observed that, in order to facilitate passage of copyright legislation, the FCC had sacrificed some of those proposals in favor of modifications proposed by the affected industries. The court merely required the FCC to reexamine those modifications after passage of Copyright Act, to ensure that they made " . . . some discernible contribution to the public interest. . . ." *Id.* at 980-81 n.59.

[256] *See supra* para. 68. In its 1979 report on the syndicated exclusivity rules, the Commission suggested that the Copyright Act's compulsory license had finally resolved the question of "unfair competition" between cable and broadcasting. *See Syndicated Exclusivity Report*, 71 FCC 2d at 969. However, the subsequent court decision in *Malrite T.V. of N.Y. v. FCC*, discussed above, makes clear that the Copyright Act does not foreclose our ability to modify the competitive relationship between cable and broadcasting through changes in the program exclusivity rules, so long as the basic arrangement of the compulsory license is left undisturbed. Therefore, to the extent the report may have suggested that "unfair competition" between cable and broadcasting is exclusively governed by the Copyright Act, we expressly reject that view. In addition, we note that the Commission's view of its jurisdiction was apparently based in part on a misreading of *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (*"HBO"*). The Commission suggested that the *HBO* decision limited FCC jurisdiction over cable systems to matters involving "debilitating economic competition" to broadcasting and not mere "unfair competition." *HBO*, however, involved the Commission's power to regulate programming originating in the studios of cablecasters, not cable retransmissions of broadcast programming. The *HBO* panel thus made clear that its concern as to the FCC's jurisdiction over cable in that case did not extend to circumstances involving cable retransmissions of broadcast signals. *See id.* at 41, n.28 (Judge Mackinnon's separate view that FCC jurisdiction over cable is restricted to instances where cable systems substantially rely on broadcast signals or their activities amount to unfair competition); *id.* at 61 (Weigel, J., concurring).

[257] *See supra* para. 68; Communications Act of 1934, 47 U.S.C. secs. 301, 307(b) (1981).

[258] Webster's Third New International Unabridged Dictionary contains definitions that use the word in both of these senses.

[259] All the Commission is doing is permitting the contracting parties to decide on what basis programs are sold and then to enforce their contracts. If programs are sold non-exclusively, cable will continue to be able to carry duplicative programming on imported signals. But where a broadcaster has negotiated exclusive rights, the broadcaster will be able to enforce that provision against cable -- just as cable can now enforce an exclusive program right against broadcasters.

[260] The House Report makes absolutely clear that FCC regulations are "federal laws" for purposes of this section, *see* H.R. Rep. No. 934, 98th Cong., 2d Sess. at 95.

[261] We are not suggesting that the imposition of syndicated exclusivity is a content-based regulation of speech, as that terminology is used under a constitutional analysis, *see infra* n.279; nor are we suggesting that programming subject to exclusivity rights is not protected by the Constitution. We merely use this analysis to illustrate the Act's separate treatment of regulations that affirmatively require speech and those that negatively restrict it. That treatment leads us to conclude that section 624(f)(1)'s use

of the term "requirements" applies only to affirmative requirements, regardless of whether those requirements are content-neutral or content-based.

[262] Indeed, Congress expressly envisioned that the Commission might alter its syndicated exclusivity rules. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). 177. While it is conceivable that Congress subsequently intended to remove that discretion, when it passed section 624(f) of the Cable Act, we believe it unlikely that Congress would have done so in such an oblique way. Syndicated exclusivity rules simply do not fall neatly into the provision of section 624(f)(1).

[263] The Commission's decision to reimpose syndicated exclusivity is completely consistent with Congress' understanding, as expressed in the legislative history, that the Commission can amend its rules as to permissible signals for communications policy purposes. *See* H.R. Rep. No. 1476, *supra*, at 89. Congress, of course, recognized that any rule change could have an effect on copyright and the compulsory license. As explained above, the Commission is adopting the rule for communications policy reasons but recognizes its ancillary effect on the compulsory license.

[264] In addition, due to the unique relationship between these rules and the Copyright Act, a principal effect of the rules is to enable broadcasters to enforce program exclusivity rights against cable systems through civil actions for copyright infringement. As discussed above, section 624(f)(2)(B) makes clear that cable systems are not immunized from copyright liability.

[265] As indicated *supra*, para. 125, the Commission's authority to adopt these amendments to our regulations is also derived from our general authority to enact regulations that are reasonably ancillary to our Title III authority over television broadcasting. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). That pre-existing authority, we believe, was not disturbed by the Cable Act. Section 2(a) of the Communications Act, as amended by the Cable Act, now provides that " . . . t[he] provisions [of the Communications Act] shall apply with respect to cable service . . . as provided in [the Cable Act]." 47 U.S.C. section 152(a)(1981). The Supreme Court in *City of New York v. FCC*, *supra*, found it unnecessary to decide whether this amendment withdrew the Commission's pre-existing general authority over cable service. The Court did note, however, that the legislative history "suggests this language is merely a more explicit grant of 'exclusive jurisdiction' to the Commission over specified aspects of cable service . . ., which settles matters that had occasionally been in dispute." *Id.* at 4418 n.6 (citations omitted). We think the Supreme Court's view of the legislative history accurately reflects the intended purpose of the Cable Act's amendment to section 2(a) and that the new language thus does not change our pre-existing, general authority over cable. In any event, as discussed above, we think section 624(f)(2)(A)(ii) of the Cable Act affords express authority to adopt these amended regulations.

[266] The three other "types" of signal carriage rules were the must carry rules, rules requiring deletion of sports programs, and rules limiting carriage of commercial and noncommercial distant signals. *Id.*

[267] The differences between the rules' scope of applicability, rationale, and operational features were described by the Commission in a *Notice of Proposed Rule Making* in Docket 20482 as follows:

> . . . most program schedules include far more network programs than syndicated programs, . . . the number of systems now subject to our syndicated program exclusivity rules (due to market location, etc.) is significantly smaller than that number obligated to protect network programs, and . . . the syndicated protection rules, in contrast to the network rules, do not necessarily provide insulation against audience fractionalization because of the ability of systems to insert non-protected programs during those times when protected programs must be deleted.

53 FCC 2d 391, 392 (1975) (footnote deleted).

[268] *See, e.g., Decision* in Docket 18897, 41 FCC 2d 1005, 1006 (1973) in which the Commission stated that "different considerations" were involved in the syndicated exclusivity rules and network nonduplication mandatory carriage and sports blackout rules, but, in that same proceeding, also expressly recognized that syndicated exclusivity and network non-duplication were the same type of rule. *See id.* at 1005.

[269] In the *Syndicated Exclusivity Report*, the Commission, speaking of our former syndicated exclusivity provisions, observed that "[a]lthough the rules are . . . described as 'designed . . . to protect local broadcasters,' the form of the rules suggests that they were principally intended as protection for program owners." 71 FCC 2d at 976-77. *See also supra* paras. 34-44, discussing the potential for audience diversion in the absence of syndicated exclusivity rules.

[270] The House Committee, for example, determined that cable's retransmission of network programming, including network programming imported from distant markets, did not injure the copyright holders of that programming, because those holders intended for their product to reach a national market and therefore could be adequately compensated in their initial negotiations for distribution rights. Similarly, the Committee determined that the retransmission of local broadcast signals (be they of syndicated or network programming) did not injure those copyright holders because they, too, could be compensated in their initial negotiations for distribution rights, knowing that the programming would be retransmitted over the local cable system. On the other hand, the Committee found that the retransmission of syndicated programming imported from a distant market injured copyright holders because those holders did not intend for their programming to reach markets outside of the locality in which they were sold and, therefore, could not be adequately compensated in their initial negotiations in those markets. Hence, the Copyright Act imposes a royalty fee only for those syndicated programs imported from distant markets. *See* H.R. Rep. No. 1476, *supra*, at 90; *see also* 17 U.S.C. Section 111(f) (1981) (providing that the royalty fee is to be calculated on the basis of a "distant signal equivalent," defined to be "the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming"). Not suprisingly, for it is consistent with the compulsory license scheme, Congress recognized that the value of syndicated programming imported from distant markets would change if Commission rules governing the exclusivity rights of that programming also changed and, accordingly, provided for the adjustment of the compulsory license royalty fee in the event of such change. 17 U.S.C. section 801(b)(2)(C)(1981).

[271] *Home Box Office, Inc. v. FCC*, 587 F.2d 1248, 1253 (D.C. Cir. 1978).

[272] U.S.Const., Art. I, Sect. 8, cl. 8.

[273] Thus, in *Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), the Court of Appeals for the Second Circuit upheld that portion of the Copyright Act that denies copyright protection to certain foreign-manufactured publications as a valid economic regulation authorized under the Commerce Clause.

[274] At this point in the discussion, our focus is appropriately on the constitutional authority of the federal government to enforce exclusive rights in programming, as opposed to the authority of a particular institution, be it Congress or the Commission, to do so. The latter issue is one of statutory, not constitutional, dimension. From a constitutional perspective, if Congress can confer exclusive rights in programming on producers without violating the first amendment, then it can authorize the Commission to do so as well. The issue of whether Congress has, in fact, given that authority to the Commission (which we have already concluded that it has) is a statutory matter, not a constitutional one.

[275] 433 U.S. 562 (1977), *on remand*, 54 Ohio St. 2d 286 (Ohio, 1978).

[276] 433 U.S. at 564-65.

[277] The Supreme Court has never squarely held that exclusive rights to distribution afforded under the federal copyright laws do not violate the first amendment, but in *Zacchini* the Court cites, with approval, lower court decisions that have upheld the federal government's ability to promote exclusive rights in authors' works against first amendment challenges. *Id.* at 577 n.13, *citing*, *United States v. Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972); *aff'd in part, rev' d in part*, 581 F. 2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Robert Stigwood Group Ltd. v. O' Reilly*, 346 F. Supp. 376 (D. Conn. 1972), *rev' d*, 530 F. 2d 1096 (2nd Cir. 1976), *cert. denied*, 429 U.S. 848 (1976). *See also Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); Schnapper v. Foley, 471 F. Supp. 426 (D.D.C. 1979), aff'd, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982). Regardless of whether the imposition of our exclusivity rules is characterized as a copyright or communications issue, the first amendment analysis is the same. Either the federal government has the authority to impose such rules consistently with the first amendment or it does not. The issue of whether the Commission's imposition of such rules is a copyright matter that is outside of the Commission's jurisdiction is solely statutory. We have already concluded that the adoption of these rules is within our statutory authority.

[278] *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974). In this regard, the Ninth Circuit has stated: "Ideas which may be of public interest are not subject to copyright; the specific form of expression of these ideas are. Thus, the political views of Dr. Martin Luther King may be widely disseminated. But the precise expression of these views in a speech may be protected." *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). On the basis of this view, courts have also rejected arguments that the Copyright Act's remedy of injunctive relief, 17 U.S.C. Section 502 (1981), violates the first amendment. *Pacific and Southern Co. v. Duncan*, 744 F. 2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F. 2d 1184 (5th Cir. 1979); *Walt Disney Productions v. Filmation Associates*, 628 F. Supp. 871 (C.D. Cal. 1986).

[279] Cole/Raywid are simply wrong when they suggest that syndicated exclusivity is a content-based regulation of speech, as that terminology is used in a first amendment analysis. Rights of exclusivity can attach to any copyrightable programming, regardless of content.

[280] We need not adopt the arguments advanced by some commenters that cable operators do not enjoy full first amendment protection in order to reach this conclusion, because we have based our analysis on a traditional first amendment approach to this area of the law. Nor do we believe that the constitutionality of exclusivity rules must necessarily be evaluated under the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), as further limited by *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), and *United States v. Albertini*, 472 U.S. 675 (1985) on remand, 783 F. 2d 1484 (9th Cir. 1986). Neither the Supreme Court in *Zacchini* nor the lower courts in upholding the federal copyright laws against first amendment challenges resort to such an analysis. Nevertheless, we believe that our exclusivity rules would survive such a test. For example, having identified distortions in the market for the distribution of video programming, which in turn adversely affect the market's ability to ensure maximum diversity of programming, we have adopted rules that are directed specifically at a flaw that has created those distortions -- namely, the inability of broadcasters to contract for enforceable exclusive rights in certain kinds of programming. The rules do no more than allow broadcasters to contract for such rights.

[281] *See* 47 CFR Section 73.658(m).

[282] A hyphenated market is one in which two or more communities are considered part of the same market, *e.g.*, Dallas-Fort Worth, Texas. The hyphenated markets recognized for purposes of the non-network territorial exclusivity rule are those specified in Section 76.51 of the Rules. 47 CFR Section 76.51.

[283] *See First Report and Order* in Docket No. 18179, 42 FCC 2d 175, 183 (1973).

[284] *See id.* at 183. In reconsidering its action in this matter, the Commission reiterated its belief that the rule would serve the public interest by fostering the development of additional television stations. *See also Memorandum Opinion and Order* in Docket No. 18179, 46 FCC 2d 892 (1974).

[285] Petitions for waiver of Section 73.658(m) have been filed by: 1) Blair Broadcasting of California, Inc., licensee of KSBW-TV, Salinas, CA; 2) United Television Inc., licensee of KMSP-TV, Minneapolis, MN; 3) Chapman Radio and Television Corp., licensee of WTTO-TV, Homewood-Birmingham, Al; 4) Times Southwest Broadcasting, Inc., licensee of KFSM-TV, Fort Smith, AR; and, 5) Pappas Telecasting Inc., licenseee of KMPH-TV, Visalia, CA, Retlaw Enterprises Inc., licensee of KJOE-TV, Fresno, CA, and San Joaquin Communications Corp., licensee of KSEE-TV, Fresno, CA. (joint filing). In view of our decision herein to postpone action regarding Section 73.658(m), these requests for waiver will be held in abeyance until we resolve the non-network territorial exclusivity issue.

[286] The revised rule is set forth in Appendix B.

STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS CONCURRING IN PART; DISSENTING IN PART

In Re: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries.

Reluctantly, I concur in the reimposition of syndicated exclusivity ("syndex") rules. Many of the reasons the majority cites to support this action are unconvincing, wrong or both. Rather than enumerate my differences and disagreements, I write separately to state why I think the public interest is marginally served by syndex.

Diversity

The singular advantage of syndex is that it promotes diversity of programming – one of the most important public interest goals the FCC historically has pursued. When the Commission repealed the old syndex rules in 1980, it did so, in part, to encourage time and episode diversity. Only 19% of American homes then subscribed

to cable television services. Because few national program services were available, cable relied heavily on distant signal importation for its programming. By allowing these signals to be carried without deletions caused by syndex rules, the Commission hoped to diversify program choices available to cable viewers. Circumstances have changed dramatically since 1980. There are now 85 national cable networks. Cable television now serves 45 million homes (compared with 14.8 million in 1979) and cable services such as ESPN, USA, and CNN have vastly expanded their reach and their programming efforts. Compared to 1980, cable systems are far less dependent on importation of distant signals. The average cable system now carries only three distant independent signals. Cable television has become an important source of original video programming instead of merely a vehicle for retransmitting broadcast signals.

By reimposing syndex, we will accelerate cable's liberation from dependence on broadcast signals. Eventually, this should give cable viewers more choice. Cable operators will likely respond to syndex by carrying more original programming instead of the duplicated programs deleted under our rules. This does not necessarily mean an end to the time and episode diversity that many viewers value. If a program is especially popular, a local broadcaster can bargain with the syndicator for the right to show it twice a day; or a cable company can bargain with the local broadcaster for the right to carry the program on a distant signal. This decision does mean, however, that our rules will no longer tilt in favor of duplication. Instead of the so-called "Rule of Reruns," which the current system encourages, we will instead likely have a balanced menu-- of time diversity, episode diversity, and true program diversity-- that more accurately reflects viewers' preferences.

Minimizing the Costs

My decision in this proceeding was difficult, because the mostly long-term benefit of diversity will not come without some significant costs. Many cable systems will have to buy new equipment. Viewing habits may be disrupted. Transaction costs will place a burden on everyone--broadcasters, cable systems, and the Commission's own staff.

I am also concerned about the need for stability in the Commission's rules and policies. We repealed the old syndex rules just eight years ago, after imposing them eight years before that. Since then, private parties have made investments, acquired programs, and devised business plans based on the reasonable assumption that we would not reimpose syndex.

My concern, however, about the disruption that new rules could create, are eased by the exemptions and qualifications we have built in to minimize the burden of compliance. First, we exempt all cable systems with fewer than 1000 subscribers. This exemption covers 60% of the country's cable systems, although they serve fewer than 6% of all subscribers. By creating the exemption, we minimize the burden on the cable industry, while ensuring that the vast majority of the viewing public secures the benefits of our rules.

Second, we provide for a transition period of one year. This will give cable systems time to comply with the new rules and also allow them to arrange for substitute programming. The transition period will also give national and regional superstations the opportunity to run off more programming.

Third, we have made the rules mostly prospective. We will require cable systems to honor exclusivity provisions of existing program contracts only if the contract explicitly anticipated the reimposition of a syndex rule. Otherwise, if a broadcaster wants to assert exclusivity, it will have to obtain the syndicator's written consent. This rule ensures, as much as possible, that broadcasters do not reap a windfall at the expense of cable.

Fourth, our notice rules are more favorable to cable systems than the rules we had in place between 1972 and 1980. Under the old syndex rules, broadcasters asserting exclusivity gave cable systems only seven days' notice of their obligation to delete a distant signal. Under the new rules, a television station must notify cable systems within sixty days after the station signs a program contract. Because contracts for most programs are signed a year or two in advance, this will give cable systems more than ample notice of their obligation to delete. Even for programs acquired with a shorter lead time, broadcasters must give cable systems at least 60 days' notice. These liberal notice provisions will give cable systems much more opportunity than they had under our old rules to arrange for substitute programs and to submit accurate program listings to newspapers and magazines.

Jurisdiction

Several parties argued that the Cable Act of 1984 stripped us of jurisdiction to reimpose syndex. This is admittedly a close case. I believe, however, the Commission can make a plausible argument that we do have the necessary authority.

Territorial Exclusivity

I fully support the decision to amend our territorial exclusivity rules to allow broadcasters to buy exclusive national rights to programs. Broadcast networks such as ABC, NBC, and CBS, of course, can already buy exclusive national rights. National cable networks such as USA and ESPN do the same thing. Under our new rules, individual broadcast stations will have the same privilege. For example, WTBS, Atlanta, already competes openly for national ratings and advertising. Other stations, such as WWOR, New York, and WGN, Chicago, are also widely circulated on cable systems throughout the country.

By changing our territorial exclusivity rule, we allow these stations and others to compete, should they choose to, in the national market for the acquisition of programming. This change in the territorial exclusivity rule complements our action on syndicated exclusivity, since it gives broadcasters the right to contract for national exclusivity as well as local exclusivity. In all other respects, we will leave the territorial exclusivity rule intact for now and reexamine it in a Further Notice.

Dissenting, in Part

I also write separately to dissent from the part of the majority decision which takes a less than solid stand on a sunset for syndex. If Congress adopts full copyright liability for syndicated programming imported on distant signals, syndex rules would be superfluous -- they would not just "appear to be" so. We should then repeal syndex, not just "act on this matter." We owe the affected industries

and the public more predictability upon which to base their own decisions and actions. If the majority does not mean to "act on" syndex by repealing it, it should say so. If it does, it should say so unequivocally.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries.

In 1980, I registered a vigorous dissent to elimination of the syndicated exclusivity rules. At that time, I believed that elimination of these rules would result in a gross disparity in the marketplace to the detriment of local broadcasting. Given the recent demise our must carry rules, the need for syndicated exclusivity becomes all the more important.

As a strong supporter of syndicated exclusivity protection, I find myself in the uncomfortable position disagreeing with the procedures established to reinstate these rights. Accordingly, I feel compelled to register a concurrence on this issue.

My concern revolves primarily on the application of our new rules to existing programming contracts. When the syndicated exclusivity rules were eliminated in 1980, the Commission allowed the importation of duplicative distant signals notwithstanding the broadcaster's contractual rights to exclusivity in the marketplace. The Commission's decision, however, departs from this procedure and does not restore syndicated exclusivity to all existing contracts. Rather, the Commission establishes various mechanisms to determine whether existing contracts have syndicated exclusivity protection.

In order for the *Commission* to determine whether a broadcaster has exclusivity protection, the licensee must demonstrate that its contract contains specific provisions stating in effect that the parties contemplated a reinstatement of the syndicated exclusivity rules. I doubt that such precise language appears in a significant majority of existing contracts. Obviously, there are numerous ways parties could draft language evidencing an intent to afford a licensee syndicated exclusivity protection. I simply do not see the need to require existing contracts to contain specific language stating that the parties contemplated reimposition of rules. Rather, if there is language referencing syndicated exclusivity, then it should be sufficient for the *Commission* to grant exclusivity protection. Giving legal effect only to specific language created by the Commission years after the contracts were drafted is unduly restrictive. Moreover, this approach substitutes the Commission's judgment for that of the parties as to how to draft syndicated exclusivity contracts. More importantly, requiring such language is antithetical to the central premise of our decision that the intent of the parties, not the government, should govern. It is unreasonable to expect parties to have had the clairvoyance to anticipate the language envisioned by the Commission years after the contracts were executed.

Simply stated, I do not believe the decision goes far enough in correcting the gross disparities now existing in the broadcast marketplace. The procedural hurdles created by this decision place local broadcasters in a position where they will be forced to renegotiate their contracts with program syndicators. In other words, they will be forced to rely on the good graces of program syndicators to determine the scope of their exclusivity rights. I beleive the Commission should not delegate its public interest responsibilities on this issue.

I am also troubled issuing a *Further Notice of Proposed Rulemaking* concerning the non-network territorial exclusivity rule. The rule is essential to ensure that television stations in overshadowed markets are able to negotiate for programming in areas they are licensed to serve. The Commission licenses these stations to serve their local communities. Accordingly, while I agree that the freedom to contract for exclusive rights is essential to the operation of the marketplace, it must, nevertheless, be balanced against countervailing communications policy, in this case localism. Moreover, unlike syndicated exclusivity, we are not confronted with a marketplace imbalance that is attributable to the compulsory license.

There is little or no evidence in the record contradicting the Commission's previous conclusions regarding the need for the current non-network territorial exclusivity regulations. The rule is essential to ensure the distribution of quality program product to small markets that are adjacent to large television markets. I see no need to question the rule at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

UNITED STATES CELLULAR OPERATING COMPANY OF PANAMA CITY, FLORIDA — File No. 01259-CL-L-88

For license to cover construction permit to operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Panama City, Florida Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1988; Released: September 2, 1988

By the Chief, Mobile Services Division:

1. United States Cellular Operating Company of Panama City, Florida (USCC) has filed an application for a radio station license to cover its construction permit to operate in the Domestic Public Cellular Radio Telecommunication Service on frequency Block B (wireline) in Panama City, Florida. Cellular One of Panama City (Cellular One) has filed a petition to defer the issuance of the covering license. USCC has filed an opposition to the petition. For the reasons set forth below, we will deny the petition and grant the application.

BACKGROUND AND CONTENTIONS

2. Cellular One requests that the Commission delay granting operating authority to USCC for a period of six months, or until resale can be negotiated and implemented. Cellular One maintains that, in the absence of a resale agreement, USCC's headstart in the Panama City MSA will result in anticompetitive service offerings because the Panama City market is small, seasonal in nature and possesses a limited demand for cellular telephone service.[1] Cellular One states that a headstart by USCC in such a small market would diminish Cellular One's ability to obtain the "critical mass of subscribers necessary to operate a viable enterprise." Since the granting of USCC's cover license would permit USCC to begin service in the summer months when "spending is at a peak" in the Panama City MSA, Cellular One asserts that this would permit the wireline to effectively extend its headstart for "nearly one year," preventing customers from receiving the benefits of facility-based competition.

3. In its opposition, USCC responds that Cellular One has failed to meet the heavy burden of proof needed to establish grounds for the Commission to invoke the "headstart" doctrine. USCC also maintains that Cellular One has not assembled compelling and market-specific evidence that a deferral of operating authority would be in the public interest and not merely in its private interest.[2] In addition, USCC maintains that cellular licensing proceedings are not the appropriate forum to raise resale grievances; rather, a complaint for relief under Section 208 of the Communications Act would be the appropriate forum. Lastly, USCC points out that while it did have unforseen internal corporate delays in developing a proposed resale agreement, such an agreement has now been submitted to Cellular One and USCC is prepared to commence reselling to Cellular One immediately upon commencement of operations of its Panama City System.

DISCUSSION

4. The Commission has emphasized that it would defer action on a wireline application only "(w)here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Order*, 86 FCC 2d 469, 492 (1981), modified on reconsideration, 89 FCC 2d 58. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "(b)ears a heavy burden of demonstrating that such action would be in the public interest." *Cellular Order*, reconsideration, 89 FCC 2d 75 at n.32. The Commission's goals for cellular radio is not to guarantee the economic well-being of any applicant or licensee, but rather to further the public interest in receiving reliable, economic service as soon as possible. *Cellular Order*, *supra* at 74-75; *see also*, *Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (Mob. Serv. Div., released May 26, 1988) at par. 4. The fact that an applicant or licensee may suffer economic harm is not enough to warrant delaying the implementation of cellular service. *Eau Claire*, *supra* at para. 5. With regard to the resale issue raised by Cellular One, we have stated that "no restrictions on resale and shared use of cellular services will be permitted," and that we require the wireline licensee to "provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as to its own distribution arm." *Miami CGSA, Inc.*, Mimeo 4507, Com. Car. Bur., released May 31, 1984. Nothing in the submissions of Cellular One persuades us that the applicant violated or will violate either of these requirements. Cellular One's contention that USCC has been uncooperative and/or reluctant to negotiate resale arrangements was squarely answered by USCC's proposed resale agreement and statements of intent in its Opposition at p. 5.

5. Based on a review of its petition to defer, we find that Cellular One has failed to satisfy its heavy burden of demonstrating that early wireline entry will so jeopardize the development of a competitive market in Panama City as to be contrary to the public interest. Aside from its failure to allege market specific data, Cellular One has not presented any other evidence of any possible anticompetitive effects or that USCC entry now in the Panama City MSA will be detrimental to the public. [3]

6. With respect to Cellular One's specific allegations concerning resale, we conclude that this is not the proper forum in which to make such charges. To the extent that a reseller deems that the rates, terms and conditions of a resale agreement violate Commission rules or policies, it may submit a formal complaint requesting relief under

Section 208 of the Communications Act of 1934, as amended, and Section 1.721, et. seq., of the Commission's Rules. *See* e.g. *Brown County MSA Limited Partnership*, 2 FCC Rcd 4612 (Com. Car. Bur., released August 5, 1987).

7. Accordingly, IT IS ORDERED, That the application of United States Cellular Operating Company of Panama City, Florida for a covering license, File No. 01259-CL-L-88, is GRANTED.

8. IT IS FURTHER ORDERED, That the Petition to Defer filed by Cellular One of Panama City is DENIED.

9. This order is issued under Section 0.291 and Section 1.108 of the Commission's rule and is effective on its adoption date. Petitions for reconsideration under Section 1.106 and applications for review under Section 1.115 may be filed within 30 days of the date of the public notice of this Order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Petitioner states in his pleading that spending in the Panama City MSA is concentrated in spring and summer and that in 1980, the MSA had a population of 100,000 persons. No statistical studies of the market were appended.

[2] Cellular One is already a cellular permitee having been granted its construction permit on July 23, 1987 which has provided it an opportunity to contruct its system for the past year.

[3] It bears repeating that our overriding responsibility is not to foster the maximum level of competition in the industry but rather to promote the public interest. *See U. S.* v. FCC (SBS) 652 F.2d 72, 104 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paul Kelley d/b/a
AMERICAN TELTRONIX
Licensee of
Station WNHM552

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1988; Released: September 7, 1988

By the Commission:

I. INTRODUCTION

1. On March 8, 1988, the Private Radio Bureau (Bureau) released a *Declaratory Ruling* (*Ruling*) finding that Paul Kelley d/b/a American Teltronix (AMTEL) is operating a private land mobile system within the meaning of Section 331(c) of the Communications Act, 47 U.S.C. § 332(c), and, therefore, is not subject to state entry and rate regulation.[1] Mobilfone of Northeastern Pennsylvania (Mobilfone) filed a petition for reconsideration of the Bureau's *Ruling* on April 8, 1988. AMTEL filed an Opposition to the Petition on April 18, 1988. On the same day, the National Association of Business and Educational Radio, Inc. (NABER) filed an Opposition accompanied by a Motion for Leave to File an Opposition to the Petition.[2] For the reasons discussed below, we deny Mobilfone's petition and affirm the Bureau's *Ruling*. [3]

II. BACKGROUND

2. AMTEL initiated this proceeding by filing a request for declaratory ruling on September 29, 1987. AMTEL asked the Bureau to find that its private carrier paging system is providing a private land mobile service and is therefore not subject to state entry and rate regulation, pursuant to Section 331(c) of the Communications Act, 47 U.S.C. § 332(c). Mobilfone, a radio common carrier with a service area overlapping that of AMTEL, opposed the petition, arguing that AMTEL is not operating a private land mobile system because it is providing paging service to ineligible users.

3. The Bureau found that AMTEL is operating a private land mobile system under the definitional test of Section 331(c)(1) of the Act[4] and that the State of Pennsylvania is therefore precluded from subjecting AMTEL to any rate or entry regulation under Section 331(c)(3). The Bureau also found that the possibility that AMTEL may have served ineligible users would not make AMTEL a common carrier, although it could indicate that AMTEL had violated the terms of its license.[5]

III. SUMMARY OF THE PLEADINGS

4. In its petition for reconsideration, Mobilfone asks that we reverse the Bureau's determination that AMTEL is operating a private land mobile system. It argues that AMTEL cannot be a private land mobile system operator pursuant to Sections 3(gg) and 331(c)(1) of the Act, because AMTEL provided service to ineligible users.[6] Mobilfone also contends that Section 331(c)(3), 47 U.S.C. § 332(c)(3), does not preempt inquiry by a state into the regulatory status of an operator.[7] Mobilfone further challenges the findings of the Bureau's investigation of allegations that AMTEL served ineligibles and advertised as a common carrier. Mobilfone, to this end, alleges that the Bureau erred in not imposing sanctions following its investigation.[8]

5. AMTEL, in response, states that the *Ruling* is factually and legally sound in all respects.[9] AMTEL supports the Bureau's analysis as correctly based on the statutory language[10] and the legislative history of the 1982 amendments to the Communications Act.[11] Furthermore, AMTEL contends that the *Ruling* is consistent with Commission policy and precedent.[12] NABER also supports the *Ruling*, noting that the Commission's analysis of the functional distinction between private and common carrier land mobile services was affirmed by the United States Court of Appeals for the District of Columbia.[13] Additionally, NABER indicates[14] that a contrary result would subject its members to litigation in the various states thereby defeating the Congressional purpose underlying Section 331 of the Act, 47 U.S.C. § 332.

IV. DISCUSSION

6. In the Communications Amendments Act of 1982, Congress amended Section 331 of the Act to establish a functional approach for distinguishing between private land mobile and common carrier services.[15] The test, codified in 47 U.S.C. 332(c)(1), turns on whether the system resells for profit telephone services or facilities of a common carrier.[16] A principal purpose of this statutory provision was to resolve the considerable litigation that had arisen under the case-by-case analysis required by the "NARUC" test[17] for common carriage. Congress sought to preclude further litigation by providing a "clear demarcation" between common carrier and private land mobile services.[18] Because AMTEL does not resell the services or facilities of a common carrier for profit, the Bureau correctly concluded that AMTEL is operating a private land mobile radio system.

7. Mobilfone asserts that Section 331 establishes a dual-prong test that includes both the functional distinction based on resale and definitional prerequisite of user eligibility.[19] We fully recognize that the resale test in Section 331 applies only to private land mobile services, as defined in Section 331(c)(1) itself and in Section 3(gg) of the amended statute, 47 U.S.C. §§ 332(c)(1) and 3(gg). Under these provisions, a private land mobile service entails service to eligible users. Eligibility of system users, however, is not statutorily prescribed but is within our discretion.[20] The amended statute gives no indication of any Congressional intent that eligibility issues trigger the imposition of state regulatory authority and in no way limits out authority to enforce our eligibility rules, or our broad discretion to modify them in the future.[21] The power to define classes of eligible users for land mobile service continues to lie exclusively with this Commission. Moreover, exami-

nation of user eligibility to determine whether common carriage is occurring, or has occurred, would result in the case-by-case analysis and litigation that Congress sought to forestall by amending Section 331. We conclude, therefore, that Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier. A private land mobile service licensee's violation of Commission rules concerning eligible users does not somehow transform the licensee's operations from private to common carriage.

8. Given this conclusion, we reject Mobilfone's contention that state regulatory authorities may exercise jurisdiction over private land mobile service systems to investigate their regulatory status with a view toward imposing sanctions for uncertificated common carrier operations. Section 331(c)(3) explicitly provides that, "No State or local government shall have *any* authority to impose *any* rate or entry regulation upon *any* private land mobile service. . . ."[22] Accordingly, any exercise of state authority over private land mobile licensees to implement state certification requirements in these circumstance is flatly prohibited.[23]

9. Mobilfone further criticizes the adequacy of the Bureau's investigation and disposition of its allegations that AMTEL served ineligible users and advertised its services under the "common carrier" heading in the local Yellow Pages®. The record indicates that AMTEL did provide service to ineligibles. AMTEL explains, however, that such actions were unintentional, few in number, and service was cancelled promptly upon discovery. In most of these instances, AMTEL maintains that the customer misrepresented its eligibility status. The record also discloses that AMTEL advertised under the common carrier heading in the local Yellow Pages®. Here, again, AMTEL admits that sales agents placed the advertisements in question but contends that the actions of non-exclusive agents who sell the services of other communications providers do not warrant sanctions or transform AMTEL into a common carrier subject to state regulation.[24] Upon consideration of these facts, the Bureau concluded that the alleged violations of the Commission's rules did not warrant further investigation or the imposition of sanctions.[25] Mobilfone has provided no additional facts on reconsideration to persuade us otherwise. There is nothing to indicate that the Bureau did not fulfill its mandate to investigate allegations of rule violations. Moreover, the discretion to decline to impose administrative sanctions is fully within this Commission's inherent power to enforce the Communications Act and our regulations.[26] In any event, were sanctions warranted, they would take the form of a notice of violation, forfeiture or license revocation, not reclassification of AMTEL as a common carrier.

V. CONCLUSION

10. The Petitioner has failed to provide a basis for reconsideration. The Bureau fully considered Petitioner's arguments and, moreover, its *Ruling* was based on the plain meaning of the statutory language and the legislative history of the 1982 amendments to the Communications Act.[27]

11. Accordingly, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, and in view of the preceding discussion, IT IS ORDERED THAT the Petition for Reconsideration filed by Mobilfone of Northeastern Pennsylvania IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] In the Matter of Paul Kelley d/b/a American Teltronix, 3 FCC Rcd 1091 (1988).

[2] We hereby grant the motion and accept NABER's Opposition because its membership has a substantial interest in the outcome of this proceeding. *See* 47 C.F.R. § 1.106(b)(1). We also accept Mobilfone's May 3, 1988 late-filed Consolidated Reply to the Oppositions of AMTEL and NABER to further the development of a complete record in this proceeding and because no party will be prejudiced by this action. We reject, however, as untimely Mobilfone's July 21, 1988 petition for leave to file a Supplement to its Consolidated Reply. The information Mobilfone seeks to submit, consisting mainly of excerpts from transcripts of hearings conducted by the Pennsylvania Public Utility Commission on October 20, 1987 and April 25, 1988, was previously available and Mobilfone has not shown why it could not have been submitted before now. In any event, we have reviewed the information contained in the Supplement and find that it is not dispositive of the issues in this proceeding.

[3] Under Section 1.106(a)(1) of our Rules, 47 C.F.R. § 1.106(a)(1), petitions for reconsideration of final actions taken pursuant to delegated authority will be acted on by the delegated authority or referred by such authority to the Commission. The Bureau has referred the subject petition to us in light of the importance of clearly establishing this Commission's views on the issues discussed herein.

[4] *See* discussion *infra* at ¶ 6.

[5] *Ruling* at ¶ 13.

[6] Petition at 9-13.

[7] *Id.* at 14-15.

[8] *Id.* at 15-19.

[9] AMTEL's Opposition, 10.

[10] *Id.* at 6-7.

[11] *Id.* at 4-6.

[12] *Id.* at 5 (citing In the Matter of Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988) (M&S)).

[13] Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985) (*Millicom*).

[14] NABER's Opposition, 5.

[15] P.L. 97-259, 96 Stat. 1087 (September 13, 1982); *See* H.R. Conference Rep. No. 765, 97th Cong., 2d Sess. 54, reprinted in 1982 U.S. Code Cong. and Ad. News 2237 (H.R. Conf. Rep.). *Accord Millicom*, 761 F.2d at 765.

[16] H.R. Conf. Rep., *supra*, at 56.

[17] *See* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

[18] H.R. Conf. Rep., *supra*, at 54; *Millicom* 761 F.2d at 765.

[19] *See* Petition at 9-11.

[20] M&S, *supra* n. 12, ¶¶ 19-25 (basis of Commission's decision to expand eligibility).

[21] *See* H.R. Conf. Rep., *supra*, at 54.

[22] 47 U.S.C. § 332(c)(3) (emphasis added).

[23] While states are free to bring to our attention information concerning possible rule violations by Commission licensees, they cannot, in compiling such information, subject private land mobile licensees to the compulsory process of any state or local regulatory bodies. As the state PUC apparently recognized, any final determination that unauthorized operation has occurred may properly be made only by this Commission. *See* 3 FCC Rcd 1091 at ¶ 7.

[24] In light of AMTEL's admissions and forthright conduct, demonstrated in the record of this proceeding, we find no basis for Mobilfone's assertion that AMTEL lacked candor. *See* Petition, 5-8.

[25] *Ruling* at n. 21.

[26] We will continue to take seriously violations of our rules and will investigate, as required, evidence of any wilfull and repeated violations that are brought to our attention. *See* 47 U.S.C. § 312.

[27] In its Request for Reconsideration, Mobilfone raises a minor procedural issue not considered by the Bureau. Mobilfone alleges that the Bureau issued its *Ruling* before the conclusion of the pleading cycle. Petition, 9. Pursuant to Section 1.45 of the Commission's Rules, parties may file an opposition to an initiating document, such as a request for a declaratory ruling, followed by a reply. Subsequent pleadings are strictly discretionary. 47 C.F.R. § 1.45(c). Accordingly, the pleading cycle ended when AMTEL replied on November 10, 1987, to Mobilfone's Supplement to its Partial Opposition. The subsequent pleadings were merely discretionary and did not operate to extend the pleading cycle beyond the initial opposition and reply. Therefore, the *Ruling* adopted on February 29, 1988, was issued well after the conclusion of the pleading cycle.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Commission's
Rules to Authorize Frequencies
for Communications Between Police
and Amateur Radio Stations.

ORDER

Adopted: August 4, 1988; Released: September 7, 1988

By the Chief, Private Radio Bureau:

1. On February 29, 1988, William R. Gardner filed a petition to amend the Commission's Rules to permit amateur stations to engage in direct emergency communications with local police and state patrol offices. The petitioner proposes a system whereby amateur stations would transmit emergency messages on amateur service frequencies to be designated as "National Police Box Frequencies." These transmissions would be monitored at local police and state patrol offices. The police and state patrol base station transmissions on police frequencies would, in turn, be monitored at amateur stations.

2. The petitioner argues that it is vital to allow amateur operators during emergencies to communicate directly with local police or state patrol offices. He compares his proposed system with police call box systems that many large cities had years ago. The police call boxes had a direct line to police headquarters. Such systems provided the public with a way to call the police and summon help.

3. The type of communications the petitioner envisions are prohibited by the Commission's Rules. Although Section 90.19(a) of the Commission's Rules, 47 C.F.R. § 90.19(a), authorizes police radio stations to transmit communications essential to official police activities, it does not authorize communications with amateur stations. Amateur stations are prohibited by Section 97.89(a)(3) of the Commission's Rules, 47 C.F.R. § 97.89(a)(3), from communicating with any station that is not authorized by the Commission to communicate with amateur stations. Further, Section 97.110 of the Commission's Rules, 47 C.F.R. § 97.110, prohibits the transmission of business communications by an amateur station, except for emergency communications directly related to the immediate safety of life of individuals or the immediate protection of property. The term "business communications" in this context includes communications in conjunction with a normal police patrol.[1] Thus, the exception provided for emergency communications by Section 97.110 does not provide the basis for using amateur service frequencies and facilities to supplement police communications systems.

4. The communications the petitioner asks us to authorize here are normally conducted on public telephone systems and in the Police Radio Service. The amateur service, on the other hand, is for the purpose of self-training, intercommunication and technical investigations carried out by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[2] The Commission has determined that the amateur service should not be used as an alternative to other radio services. [3]

5. The petitioner, in effect, seeks to use the amateur service to supplement police operations. This is not consistent with the basic purpose of the amateur service. Further, the petitioner has not demonstrated that the amateur service is an effective means of providing such supplemental communications service. In addition, most amateur stations in repeater operation provide interconnection with the public switched telephone network, a more appropriate means to communicate with local police departments. It is also noted that routine interception and divulgence of police communications could violate Section 705 of the Communications Act of 1934, as amended.[4]

6. For the reasons discussed above, we conclude that the intercommunication between amateur stations and police radio stations requested by the petitioner should not be authorized. The instant petition does not present any facts or contain any novel arguments that would justify a change in Commission policy. Accordingly, the petition does not warrant action by the full Commission.

7. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.401(e), 47 C.F.R. §§ 0.331 and 1.401(e), that the petition to amend the Commission's Rules to permit amateur and police intercommunication IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] *See* Order, 48 Fed. Reg. 32999 (1983).

[2] *See* ITU Radio Regulations No. 53 (Geneva, 1979), and 47 U.S.C. § 153(q).

[3] *See* Order, 48 Fed. Reg. 32999 (1983).

[4] 47 U.S.C. § 605.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMERICAN MOBILPHONE, INC. File No. W-2611

For a waiver of the Rules to allow a Federal government agency to be provided paging service on Business Radio Service frequencies

ORDER

Adopted: August 26, 1988; Released: September 7, 1988

By the Acting Chief, Private Radio Bureau:

1. American Mobilphone, Inc., operates a private carrier paging system in five Alabama cities on Business Radio Service frequency 462.750 MHz. It seeks waiver of Section 90.179 of the Commission's Rules, 47 U.S.C. § 90.179, in order to provide service to the Internal Revenue Service, an agency of the Federal Government. Section 90.179 provides in pertinent part that private carriers may serve only entities that would otherwise be eligible to hold a license on their frequency. Because Federal agencies are not eligible for licenses in the Business Radio Service, American Mobilphone may not provide service to the Internal Revenue Service absent waiver of this provision.

2. In support of its request for waiver, American Mobilphone states that the Internal Revenue Service wishes to use about 50 pagers to contact field agents in Alabama's major urbanized areas. The limited size of this operation does not justify the Internal Revenue Service's construction of its own system, American Mobilphone maintains. Furthermore, according to American Mobilphone, the quality of its in-building coverage and its service throughout the State of Alabama offer unique advantages to the Internal Revenue Service.

3. Pursuant to Section 1.3 of the Commission's Rules, 47 U.S.C. § 1.3, the Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies set forth by the rule. *See WAIT v. FCC*, 418 F.2d 1153 (D.C.Cir. 1969) and *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983). We do not find unique circumstances in this case that justify grant of the waiver. American Mobilphone's request contains no supporting documentation from the Internal Revenue Service indicating the basis of its desire to use American Mobilphone's system or describing any alternatives that it considered and rejected.[1] Nor is there any explanation of how the Internal Revenue Service has satisfied its needs in the past. Furthermore, since the Internal Revenue Service is not responsible directly for the safety of life or property, a waiver is not justified on public health or safety grounds.

4. We conclude under these circumstances that waiver of Section 90.179 is not warranted. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 U.S.C. § 0.331, the petition for waiver of eligible user requirements filed by American Mobilphone, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

FOOTNOTE

[1] We note, in this regard, that federal government agencies are now eligible to be SMR end users, thus providing the Internal Revenue Service with a new service option. *See* Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1988

PRIVACY ACT OF 1974
NOTICES OF SYSTEMS OF RECORDS;
PROPOSED NEW SYSTEMS OF RECORDS;
ALTERED SYSTEMS OF RECORDS;
DELETION OF SYSTEMS OF RECORDS

Notice is hereby given that the Federal Communications Commission is republishing its inventory of systems of records, including both major and minor revisions and updates. Two new systems of records will be established; three existing systems of records will be substantially modified; two existing systems of records will be combined, and consequently one redundant system will be deleted. Seven systems of records are being deleted because they no longer exist or are not systems of records as defined by the Privacy Act. Lastly, the Commission proposes to establish several "blanket" routine uses which may be made of information in various systems of records.

The complete notice of the existing systems and proposed changes will appear in the *Federal Register* in early September, 1988. Copies of the notice and detailed background information are available for inspection in Room 416, 1919 M Street, NW.

Comments on the notice may be submitted to the Privacy Act Officer, Information Resources Branch, Room 416, 1919 M Street, NW, Washington, D.C. 20554. Comments received up to 30 days after the notice appears in the *Federal Register* will be considered. Copies of any comments received may be inspected at the same address.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-398

In the Matter of

Amendment of Section 73.202(b), RM-6389
Table of Allotments,
FM Broadcast Stations.
(Rogers City, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1988; Released: September 7, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by North South Radio Group, Inc. (petitioner), requesting the substitution of FM Channel 244C2 for Channel 249A at Rogers City, Michigan. Petitioner also requests modification of the license of Station WMLQ, Channel 249A, to specify operation on the higher class channel. Petitioner stated its intention to construct the necessary facilities for operation on Channel 244C2.

2. In support of its proposal, petitioner states that granting this request would enable Station WMLQ to provide a much needed Class C2 service to the Rogers City area, which has increased in population since the station went on the air in mid-1984. Additionally, petitioner suggests that the substitution of channels will permit higher antenna and power for Station WMLQ which will avoid present interference from a Canadian Class B facility now experienced by Station WMLQ on its Class A facility.

3. We believe petitioner's proposal warrants consideration. The channel can be allotted in compliance with the minimum distance separation requirements of the Commission's Rules.[1] Canadian concurrence is required since Rogers City, Michigan is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We shall propose to modify the license of Station WMLQ, Channel 249A, as requested by the petitioner, to specify operation on Channel 244C2. However, should another party indicate an interest in the Class C2 allotment, the modification can not be implemented unless an additional equivalent channel is also allotted. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984).

5. In order to provide a wide coverage area station for the Rogers City, Michigan area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Rogers City, Michigan	249A	244C2

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 28, 1988,** and reply comments on or before **November 14, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Julian P. Freret
Booth, Freret & Imlay
1920 N Street, N.W.
Suite 520
Washington, D.C. 20036
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 244C2 at Rogers City are 45-25-17 and 83-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-79

In the Matter of

Amendment of Section 73.202(b), RM-6058
Table of Allotments,
FM Broadcast Stations.
(Iuka, Mississippi)

ERRATUM

Released: September 7, 1988

By the Chief, Allocations Branch:

1. On August 11, 1988, the Commission by its Mass Media Bureau, released a Report and Order in the above-captioned proceeding. Paragraph 6 established a window filing period for Channel 285C2 at Iuka, Mississippi. That paragraph should be disregarded as a window filing period is not required in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-50

In the Matter of

Amendment of Section 73.202(b), RM-6105
Table of Allotments,
FM Broadcast Stations.
(Ontonagon, Michigan)

ERRATUM

Released: September 7, 1988

By the Chief, Allocations Branch:

1. On August 11, 1988, the Commission by its Mass Media Bureau, release a Report and Order in the above-captioned proceeding. Paragraph 5 established a window filing period for Channel 266C2 at Ontonagon, Michigan. That paragraph should be disregarded as a window filing period is not required in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC. (hereafter MBC) — File No. BPH-870706ML

GONZALES BROADCASTING, INC. (hereafter Gonzales) — File No. BPH-870707MJ

BOLTON BROADCASTING, LIMITED (hereafter Bolton) — File No. BPH-870710MD

VOTH BROADCASTING COMPANY (hereafter Voth) — File No. BPH-870710MF

Stephen H. Thomas d/b/a REPUBLIC BROADCASTING (hereafter Thomas) — File No. BPH-870710MK

Rochelle Lucas d/b/a CARPENTER BROADCASTING (hereafter Carpenter) — File No. BPH-870710ML

TRI-CITY FM LIMITED PARTNERSHIP (hereafter Tri-City) — File No. BPH-870710MN

RADIO MABLETON LIMITED (hereafter RML) — File No. BPH-870710MT

COBB BROADCASTERS, INC. (hereafter Cobb) — File No. BPH-870710MX

METROPOLITAN MANAGEMENT CORPORATION (hereafter Metropolitan) — File No. BPH-870710MY

LORENZO JELKS (hereafter Jelks) — File No. BPH-870710MZ

QRW PARTNERS, LIMITED PARTNERSHIP (hereafter QRW) — File No. BPH-870710NF

GOLDEN EAGLE BROADCASTING, INC. (hereafter Golden Eagle) — File No. BPH-870710NH

RAINBOW BROADCASTING, INC. (hereafter Rainbow) — File No. BPH-870710NI

MABLETON COMMUNICATIONS COMPANY (hereafter MCC) — File No. BPH-870710NK

HAIRSTON BROADCASTING LIMITED PARTNERSHIP (hereafter Hairston) — File No. BPH-870710NO

MABLETON BROADCAST LIMITED PARTNERSHIP (hereafter MBCP) — File No. BPH-870710NP

MABLETON COMMUNICATIONS, LIMITED (hereafter MCL) — File No. BPH-870710NQ

RADIO COMMUNICATIONS, INC. (hereafter RCI) — File No. BPH-870710MI (PREVIOUSLY DISMISSED)

For a Construction Permit for a New FM Station on Channel 273A (102.5 MHz), Mableton, Georgia

HEARING DESIGNATION ORDER

Adopted: August 2, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary matters.* On March 21, 1988, RCI filed a petition for reconsideration of the action of the Chief, FM Branch returning its application on February 19, 1988 as inadvertently accepted for tender, and requested reinstatement of its application on a *nunc pro tunc* basis. RCI's application was found "not sufficient for tender because it failed to provide a full scale (unreduced) map or map section" in satisfaction of the requirements of paragraphs 23 and 4(b) of Appendix D of the *Report and Order* in

Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). In its petition, RCI contends that it submitted only a reduced map because it was unable to supply a full scale map "and be in compliance with the eight-and-one-half by eleven submission rule. . . ."

3. In *FM Transmitter Site Map Submission Required by FCC Forms 301 and 340*, 1 FCC Rcd 381 (1986), the Commission reiterated the requirement contained in the *Public Notice*, Mimeo 3693, released April 15, 1985, as incorporated by reference in the *Report and Order* in Docket 84-750, that applicants may submit an entire full scale site map or a full scale copy of the section of the map containing the site. " *In addition*, a reduced copy of the entire map must be included to allow the staff to verify that the lines have been correctly labeled." (Emphasis added.) 1 FCC Rcd at 382. Although RCI argues that "two additional *full scale* maps that would comply with the eight-and-one-half by eleven rule were supplied as a part of the application," these were, in fact, reduced maps; RCI failed to provide an additional entire full scale map or a full scale copy of the relevant section as required under the *Public Notice*, *supra*. Consequently, it has failed to demonstrate under 47 C.F.R. § 1.106 that the staff erred in returning its application as not sufficient for tender. Accordingly, RCI's petition for reconsideration must be denied.

4. *Jelks*. By letter dated December 9, 1987, Charles H. Badger, Office of Planning and Budget for the State of Georgia, filed an informal objection pursuant to 47 C.F.R. § 73.3587 against the tower proposed by Jelks. Mr. Badger alleged that "the proposed structure exceeds Federal Aviation Regulations (FAR) Part 77.23(a)(2) by 77 feet. . "

5. Jurisdiction over matters involving air safety issues is deferred to the Federal Aviation Administration (FAA) for analysis and judgment. The Commission recognizes the expertise of the FAA in deciding whether or not a proposed structure would be considered an air hazard. In the present case, the FAA has issued a *Notice of Review and Determination of No Hazard* on February 16, 1988 for FAA Docket Number 87-ASO-1263-OE; this notice permitted construction of a 101.8 meter (334 foot) tower at Jelks' site. As of this time, the Commission has received no indication that the FAA has reopened the case. In view of this, we will consider the FAA determination to be valid and will take no action to intervene in this matter. Accordingly, Badger's informal objection must be denied.

6. *Other matters*. On March 28, 1988, RML, pursuant to 47 C.F.R. § 73.3584, filed petitions to deny the applications of QRW, Hairston, MBLP and MCL based on allegations that the above applicants failed to timely file their respective certificates of limited partnership with the appropriate state court, thus rendering their applications "fundamentally incomplete" under 47 C.F.R. § 73.3566(a). RML's petitions to deny are essentially petitions to specify issues. Since the Commission's *Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications; Amendment of Part 1 of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleading in pending cases, the matters sought to be raised in these petitions, except where otherwise noted, have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

7. *Golden Eagle*. In response to Item 5(b), Section II, FCC Form 301, Golden Eagle indicated that an application of its principal, Eric W. Reid, for FM service at East Greenbush, New York, was dismissed with prejudice under File No. BP-810806AI in 1984, but the applicant failed to provide information concerning the circumstances surrounding the dismissal. Accordingly, Golden Eagle shall amend its application by filing a detailed response with the presiding Administrative Law Judge, within 30 days of the release of this Order, clarifying the grounds for dismissal in the prior proceeding.

8. The above applicant further indicated in response to Item 5(e), Section II, FCC Form 301, that an application of its principal, Mr. Reid, for FM service at Northampton, Massachusetts, resulted in a misrepresentation issue being specified against Reid's applicant, Cutter Broadcasting, Inc., (CBI) (BPH-840518IB) based on allegations that CBI made misrepresentations to the Commission by certifying in its application that it was financially qualified. In the *Initial Decision* in MM Docket 86-120, 3 FCC Rcd 570, 580 (February 8, 1988), the Administrative Law Judge found that allegation baseless and resolved the financial misrepresentation issue in favor of CBI. Exceptions to the *Initial Decision*, however, were filed by Northampton Media Associates on March 10, 1988 with the Commission's Review Board. Consequently, in the event of grant of a construction permit to Golden Eagle, it will be made subject to the ultimate outcome of the Northampton, Massachusetts proceeding.

9. *Tower Height*. Voth, Golden Eagle and Hairston have indicated that they will locate their respective antennas on the existing tower of WAOS(AM), Austell, Georgia. According to the Commission's database, the height of this tower (including obstruction lighting) is 109 meters above ground level (AGL) and 412 meters above mean sea level (AMSL). In their applications at Section V-B, FCC Form 301, and their tower sketches, however, the above applicants list the antenna height as 108 meters AGL and between 412 and 413 meters AMSL. Because the above applicants clearly propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in their applications, we are able to verify the correct tower height by taking official notice of the data found in the Commission's files for the licensed facility. Consequently, the discrepancies described above did not render the applications unacceptable for filing. However, Voth, Golden Eagle and Hairston shall be required to file clarifying amendments pursuant to 47 C.F.R. § 73.3514 with the presiding Administrative Law Judge within 30 days of the release of this Order which provide correct data as to tower height above ground level and above mean sea level.

10. *Thomas*. In its application at Item 7(b)(2), Section V-B, FCC Form 301, Thomas listed a radiation center of the antenna above mean sea level (RCAMSL) of 394 meters. The tower sketch portrayed this data, however, as 390 meters RCAMSL. Further engineering study revealed that this four-meter discrepancy pertaining to the RCAMSL does not affect the acceptability of the application in the instant case. This is because the correct value of 390 meters may be derived by combining the value given for elevation above mean sea level (AMSL), 305 meters, with the value given for the height of radiation center above ground, 85 meters. However, for purposes of clarification pursuant to 47 C.F.R. § 73.3514, Thomas will be required to submit an amendment specifying the cor-

rect height for antenna radiation center above mean sea level to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *Cobb and Hairston.* Cobb and Hairston propose to co-locate on an existing AM tower, but fail to indicate whether or not the site is presently fenced or, if so, at what distance. Engineering study indicates that these proposals may significantly exceed the ANSI c95.1-1982 exposure guidelines for human exposure to radiofrequency radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Cobb and Hairston may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (Apr. 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set forth in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) provides that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radiofrequency radiation exceeding specific standards. Since Cobb and Hairston's proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they will be required to submit the environmental impact information described in 47 C.F.R. 1.1311. Accordingly, Cobb and Hairston will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

12. *MCC.* In its application, MCC reports that its general partner, Ralph C. Crossley, Jr., is Assistant General Sales Manager of WAOK(AM)/WVEE(FM), Atlanta, Georgia. Furthermore, the applicant has neither provided specific information as to the nature of Mr. Crossley's duties at these stations, nor indicated that he will terminate his employment there in the event of grant of the instant construction permit. Because these stations are located approximately 5 miles southeast of Mableton, Georgia, Mr. Crossley's employment there is subject to the Commission's cross-interest policy. Accordingly, an appropriate issue will be specified below.

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Gonzales	September 14, 1987
Golden Eagle	July 6, 1988
Rainbow	February 22, 1988
MCC	November 10, 1987; January 6, 1988

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Cobb or Hairston in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine, with respect to MCL, whether the involvement of Ralph C. Crossley, Jr. with WAOK(AM)/WVEE(FM) is consistent with the Commission's cross-interest policy and, if not, whether a grant of its application would be in the public interest.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, the petition for reconsideration filed by RCI IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 4-5 hereinabove, the informal objection filed by Charles H. Badger against the application of Jelks IS HEREBY DENIED.

19. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 6 hereinabove, the petitions to deny filed by RML against the applications of QRW, Hairston, MBLP and MCL ARE HEREBY DISMISSED.

20. IT IS FURTHER ORDERED, That grant of any construction permit to Golden Eagle will be made subject to the ultimate outcome in MM Docket No. 86-120.

21. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Golden Eagle shall file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, the following applicants shall submit amendments pursuant to 47 C.F.R. § 73.3514 to the presiding Administrative Law Judge within 30 days of the release of this Order: Voth, Golden Eagle and Hairston.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Thomas shall submit a clarifying amendment pursuant to 47 C.F.R. § 73.3514 to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That in accordance with paragraph 11 hereinabove, Cobb and Hairston shall submit environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order with a copy to the Chief, Audio Services Division.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Gonzales, Golden Eagle, Rainbow, and MCC.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] By letter dated June 17, 1988, the Chief, FM Branch, dismissed the application for minor change of construction permit (BMPH-870710IC) filed by Lake Radio, Inc., licensee of WLKQ(FM), filed by Lake Radio, Inc., licensee of WLKQ(FM), Buford, Georgia, because it failed to meet the 64 kilometer spacing requirement under 47 C.F.R. § 73.207(a) by 7.5 kilometers to the referenced coordinates of the Mableton, Georgia allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-401

In re Applications of

OLIVER KELLEY AND MARY ANN KELLEY, Joint Tenants with the Right of Survivorship (hereafter Kelley)	File No. BPH-870821MB
VAL - JO COMMUNICATIONS, INC. (hereafter VCI)	File No. BPH-870827MD
MARTHA JEAN SULLIVAN (hereafter Sullivan)	File No. BPH-870827MM
COMANCHE GAP WIRELESS COMPANY (hereafter CGWC)	File No. BPH-870827MP
TEXAS FM LIMITED PARTNERSHIP (hereafter Texas FM)	File No. BPH-870827MZ
CAPRICORN BROADCASTING COMPANY, INC. (hereafter CBCI)	File No. BPH-870827NK
KITTY YOUNG (hereafter Young)	File No. BPH-870827NV

For Construction Permit
for a New FM Station on
Channel 297A (107.3 MHz)
Nolanville, Texas

HEARING DESIGNATION ORDER

Adopted: August 2, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Kelly, VCI, Sullivan, and Young.* Kelly, VCI, Sullivan, and Young[1] each indicated that they will locate their respective antennas on an existing tower currently used by private radio services. According to the Commission's data base, the accepted overall heights for this tower are 152 meters above ground level (AGL) and 403 meters above mean sea level (AMSL). However, Kelly listed the heights of the tower as 152 meters AGL and 405 AMSL, VCI listed the heights as 152 meters AGL and 402 AMSL, Sullivan listed them as 152 meters AGL and 397 meters AMSL, and Young listed them as 158 meters AGL and 409 AMSL. Because these applicants clearly propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, "drawing on the application as a whole, confidently verify the tower heights by taking official notice of the tower heights as found in the Commission's files. Accordingly, Kelly, VCI, Sullivan, and Young were found acceptable for filing; however, they shall be required to file corrective amendments with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. In response to Section II, Item 7, FCC Form 301, Kelley indicates that Oliver Kelley has an interest in Olney Broadcasting Company, an applicant for a new FM construction permit at Olney, Texas (BPH-860905MB, MM Docket No. 87-575) and that Mr. Kelley will divest his interest in this company prior to the commencement of program testing by the proposed Nolanville station. Accordingly, an appropriate condition will be specified below.

4. VCI's proposal indicates that William J. Jones is an account executive at KOOV-FM, Copperas Cove, Texas and that he will terminate that relationship upon grant of the proposed Nolanville, Texas application. Accordingly, an appropriate condition will be specified below.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. VCI and CBCI have not completed Item 4 correctly. VCI's application gives only the city and state as the residence address for Marilyn S. Vale. CBCI's application gives only a post office box number as the residence address for Dennis E. Bolding. Accordingly, VCI and CBCI must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. In its response to Section II, Item 7, FCC Form 301, CBCI indicates that Nancy L. Felix is General Manager of KTON-AM and KTQN-FM, Belton, Texas and that she will resign this position upon grant of the proposed Nolanville, Texas application. Accordingly, an appropriate condition will be specified below.

7. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by CGWI and Young would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. In response to Section VI, FCC Form 301, Young indicates that she will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), she is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. Young's EEO program is deficient because it fails to identify specific sources of recruitment specializ-

ing in minority candidates. Accordingly, Young will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	DATE AMENDMENT FILED
Texas FM	May 16, 1988

10. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: CGWI, Young.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Kelly, VCI, Sullivan, and Young shall submit amendments in accordance with paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in the event of a grant of the Kelley application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, the permittee shall certify to the Commission that its principal, Oliver Kelley, has divested his interest in Olney Broadcasting Company, an applicant for a new FM construction permit at Olney, Texas.

15. IT IS FURTHER ORDERED, That in the event of a grant of VCI's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, the permittee shall certify to the Commission that its principal, William J. Jones, has resigned the position of account executive at Station KOOV-FM, Copperas Cove, Texas.

16. IT IS FURTHER ORDERED, That VIC and CBCI shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That in the event of a grant of CBCI's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, the permittee shall certify to the Commission that its principal, Nancy L. Felix, has resigned the position of General Manager of Stations KTON(AM) and KTQN-FM, Belton, Texas.

18. IT IS FURTHER ORDERED, That Young shall submit the amendment requested hereinabove in paragraph 8 to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Texas FM.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] CBCI also proposed the use of this existing tower, specifying tower heights of 152 meters above ground level and 403 meters above mean sea level, in accordance with the Commission's records.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-402

In re Applications of

W. L. Savage d/b/a SCREAMER MOUNTAIN RADIO (hereafter Screamer) File No. BPH-870917MA

RICHARD T. TURNER JR. (hereafter Turner) File No. BPH-870918NK

For a Construction Permit
for a New FM Station on
Channel 281A, Clayton, Georgia

HEARING DESIGNATION ORDER

Adopted: August 4, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Turner*. The applicant has indicated that he is an officer and General Manager of radio station WGHC(AM), Clayton, GA. Mr. Turner has stated he will resign his positions and sever all connections with WGHC(AM) in the event that Turner is awarded a construction permit as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That if a construction permit is awarded to Turner as a result of this proceeding, Richard T. Turner Jr. will resign from his position with WGHC(AM) prior to the commencement of program test authority.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Applications of

RANDOLPH VICTOR BELL File No. BPH-870331OP
(hereafter Bell)

M. ELAINE HULSE AND WILLIAM S. HORN, A PARTNERSHIP File No. BPH-870429MJ
(hereafter Hulse)

Gail A. Dunn d/b/a GAIL DUNN BROADCAST BROADCAST ASSOCIATES File No. BPH-870429MK
(hereafter Dunn)

S. Jerry Kissinger d/b/a S. J. KISSINGER CO. File No. BPH-870429MQ
(hereafter Kissinger)

TRI STATE COMMUNITY DEVELOPMENT AND COMMUNICATIONS CORPORATION File No. BPH-870430MR
(hereafter Tri State)

COUNSELLOR FM LIMITED PARTNERSHIP File No. BPH-870430MU
(hereafter Counsellor)

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK
(hereafter Skywave)

For Construction Permit for a New FM station on Channel 298A (107.5 MHz) at Evansville, Indiana

HEARING DESIGNATION ORDER

Adopted: August 4, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hulse*. Hulse petitioned for leave to amend its application on May 6, 1988. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not i prove its comparative position after the time for fil amendments as of right has passed. Therefore, any co parative advantage resulting from the amendment will disallowed.

3. *Dunn*. On February 17, 1988, a petition to de (petition) was filed against Dunn by Martin L. Hensley, resident of Evansville and the chief engineer WZZG(FM) of nearby Henderson, Kentucky. The petiti was filed subsequent to the 30-day petition to deny peri following publication of notice of acceptance as provid by 47 C.F.R. § 73.3584, and no copy of the petition w served on Dunn. Thus, the petition will be consider only as an informal objection pursuant to 47 C.F.R. 73.3587. The petition requests the dismissal of Dun application based on allegations that Dunn, an individ applicant, misrepresented her residence address in h application, that the environmental assessment submitt with her application is in error, that the application co tains several engineering errors, and that Dunn may b serving as a front for her husband, an established broa caster.

4. Dunn reports in Section II, Item 4 of FCC Form 3 (1986 ed.) that her residence is at 4999 Division Street Evansville. Hensley, the petitioner, alleges that Dunn h misrepresented information to the Commission becau this address is a motel, the "Best Western Williamsbu Inn," operated by the applicant's husband, and that he true residence address is 2510 U.S. Highway 41 Nort Henderson, Kentucky. Attached to the petition are pag from the area telephone directory, Kentucky tax record and other materials that tend to substantiate this clai Accordingly, appropriate issues will be specified below.

5. In response to Section V-B, Item 20 of the applic tion, Dunn reports that her proposal may have a signifi cant environmental impact as provided by 47 C.F.R. 1.1307 because she proposes to construct her transmitte on the floodplain of the Ohio River. She prepared an submitted an environmental assessment (EA) with he application in accordance with 47 C.F.R. § 1.1311. The Hensley petition cited above disputes certain claims mad by Dunn in the EA. The EA states that the only disrup tions of earth will be for guy wire anchors, tower base and for a small transmitter building. Hensley states tha since the site floods regularly, the proposed constructio would require a substantial amount of earth to be move to keep the tower, guy anchor points, and transmitte building from being under water. This allegation concern the staff because 47 C.F.R. § 1.1311(b) requires EA's t detail any substantial change in the character of the lan utilized including water diversion, wetland fill, or othe extensive change of surface features. Further, Dunn state in her EA that she will file an application with the loca zoning authority for approval to construct the tower at the floodplain site, but Hensley states that she has not made the specified filing as of February, 1988. Hensley also disagrees with Dunn's belief that her proposal will not be the source of local concern and controversy and with her statements regarding the unavailability of alternative sites. In addition to Hensley's factual challenges to the EA, staff study of the EA has found that it lacks evidence of the site's approval from local land use authorities as required by Section 1.1311(c). Accordingly, Dunn will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment to her environmental assessment responding to Hensley's al-

legations and bringing her assessment into compliance with the Commission's environmental processing rules. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. Accordingly, the remaining phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corporation*, 71 FCC 2d 229 (1979), *recon. denied sub nom., Old Pueblo Broadcasting Corporation*, 83 FCC 2d 337 (1980).

6. Further, Hensley alleges that Dunn's application includes engineering errors and is based on outdated information. Staff engineering study of the application however, has determined that it is acceptable and not in violation of our technical acceptance rules. Finally, Hensley's allegation that Dunn is posing as a front for her husband is completely unsupported and will not be considered. Accordingly, Hensley's petition to deny, which has been treated as an informal objection, will be granted to the extent indicated herein and will be denied in all other respects.

7. *Kissinger*. On March 23, 1988, J.S. Brennan, a resident of Indianapolis, Indiana, submitted comments to the Commission regarding Kissinger's compliance with 47 C.F.R. § 73.3580 governing the applicant's duty to publish local notice of the filing of its application. Applicants are required thereunder to place an announcement in a daily local newspaper twice a week for two consecutive weeks to be completed within thirty days of the filing of the application. Brennan notes that Kissinger filed its application on April 29, 1987, but did not complete publication until June 7, 1987. The staff has studied Kissinger's notice and finds that it is in substantial compliance with the Commission's rules. Accordingly, Brennan's comments will not be further considered.

8. *Tri State*. Hensley submitted comments to the Commission on April 20, 1988, concerning Tri State's public inspection file. He describes his efforts to review Tri State's topographic site map and suggests that the absence of this map from the file may be a tenderability defect necessitating return of the application. 47 C.F.R. § 73.3526 requires applicants to maintain for public inspection a file in the proposed community of license containing, *inter alia*, a copy of the application and all exhibits thereto. Hensley has not demonstrated, however, that Tri State's application was not substantially complete upon its filing as defined in *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). Thus, this alleged minor defect will not cause us to return the application at this time. However, an appropriate issue will be specified below.

9. *Counsellor*. On February 24, 1988, a petition to deny (petition) Counsellor's application was filed by J.S. Brennan. Since the petition was filed late and since Brennan has not established standing, the petition will be treated as an informal objection. *See* 47 U.S.C. § 309(d)(1); 47 C.F.R. §§ 73.3584, 73.3587. Brennan alleges that an amendment filed by Counsellor on July 23, 1987, conveying the interests in the application from Counsellor FM Partnership to Counsellor FM Limited Partnership is a major amendment as defined in 47 C.F.R. § 73.3573, thus necessitating the assignment of a new file number which would place the application outside the Evansville filing window and result in its return as untimely. Brennan also alleges that Counsellor FM Partnership retains no controlling interest in the applicant. Brennan fails to realize, however, that although the legal form of the applicant has been changed by the amendment, no new parties have been added. Furthermore, Donald Ray Clement, the managing general partner of the former Counsellor FM Partnership, retains control as sole general partner of Counsellor FM Limited Partnership and the balance of the former general partners is retained as limited partners. Section 73.3573 requires the assignment of a new file number when 50% or more of the ownership of an applicant is changed. Thus, Counsellor's amendment did not violate the Commission's rules. Moreover, although Brennan correctly notes that Counsellor failed to alter its response to Section II, Item 3(a) of FCC Form 301 (1986 ed.) regarding insulation of limited partners from management and operation of the proposed station, this fact does not affect Counsellor's compliance with Section 73.3573, it merely makes all limited partners attributable.

10. The petition also addresses Counsellor's certification of site availability. In Section VII of its original application, Counsellor certifies that it secured reasonable assurance of site availability from the site's owner, Norman D. Bowls. Brennan alleges that there is no Norman D. Bowls and that the actual owner of the site is Walter S. Bowers. Although Counsellor obtained a copy of the petition and notified the Commission of its intent to oppose Brennan's claims, Counsellor never responded to this allegation.[1] Accordingly, an appropriate issue will be specified below.

11. Brennan also claims that there are several engineering errors in Counsellor's application with respect to the structure of the existing tower upon which it plans to co-locate and its failure to report that another Evansville applicant also plans to co-locate on the tower. The staff has reviewed Counsellor's engineering and has found it to be sufficiently in compliance with the Commission's technical rules. Brennan's allegation that Counsellor failed to report its filing of an application for a new FM station in Tucson, Arizona, will be discussed below. Accordingly, Counsellor's petition to deny, when treated as an informal objection, will be granted to the extent indicated above and will be denied in all other respects.

12. On June 1, 1987, the Commission also received comments from Thomas Rudd, an Evansville resident, alleging that Counsellor has tendered at least 16 construction permit applications for AM and FM stations. Additionally, Rudd perceives that the applicant has minimal concern for the Evansville community itself. In Exhibits 1 and 2 of its application, Counsellor reports that its partners, in various combinations, are involved in the applications for new FM stations in 15 different communities. The information reported is incomplete, however, since the extent that these interests are attributable to Counsellor's general partners is not indicated. Moreover, as noted above with respect to Counsellor's unreported filing of a new FM application for Tucson, Arizona (File No. BPH-870723NJ), it is uncertain to what extent Counsellor has met its obligation under Section 1.65 to notify the Commission as to any changes to its application. In the *Report and Order* in MM Docket No. 84-750, *supra*, the Commission stated that 47 C.F.R. § 73.3555 establishes at 12 the maximum number of applications acceptable for filing by any applicant and that applications filed in excess of this number will be considered inconsistent and will be returned pursuant to Section 47 C.F.R. § 73.3518. Since interests in more than 12 FM applications may be attributable to Counsellor, a question arises as to the extent of Counsellor's compliance with Commission rules.[2] Accord-

ingly, appropriate issues will be specified below. Finally, Rudd's comments relating to the fact that none of Counsellor's principals are local residents and that, the applicant may not be interested in serving the community will be dealt with as a matter of course under the comparative issue specified below.

13. *Skywave*. On January 26, 1988, Hensley filed a petition to deny (petition) against the application of Skywave. The petition will be treated as an informal objection due to its late filing. *See* 47 C.F.R. §§ 73.3564, 73.3587. Hensley contends that the applicant, Evansville Skywave, Inc., is a cover for Skywave Communications Corporation (SCC). The allegation is founded on Hensley's belief that Skywave's non-voting, preferred stock is held by SCC and that Skywave's failure to disclose this fact in its application is in error. Since Note 2(f) to the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, provides that holders of non-voting stock shall not be attributed an interest in the issuing entity, Hensley's allegations have no merit.

14. Hensley further alleges that Skywave failed to disclose the interests of its principal in a local bi-weekly newspaper, *Our Times Newspaper*. However, since the Commission's multiple ownership rules only recognize *daily* newspapers as attributable newspaper interests, this allegation will also be disregarded. *See* 47 C.F.R. 73.3555(c) n.6. As discussed more fully below, Hensley's final contention that Skywave's site is not currently zoned to permit construction of a radio tower has no bearing on the application or on the availability of the site or on Skywave's certification of reasonable assurance of the availability of its site. Accordingly, Hensley's petition will be denied.

15. *Other matters*. The Commission is in receipt of numerous informal motions objecting to the transmitter proposals of several of the Evansville applicants. Nineteen identical "petitions" were filed by Evansville residents between January 16, 1988, and March 1, 1988, requesting dismissal of Kissinger's and Tri State's applications. The petitioners state that the towers proposed by the two applicants would be an inconsistent use of the land since their proposed site borders on a residential area, two cemeteries, a park, and is near an historical marker. Additionally, the petitioners note that the proposed site, although zoned commercial, allows a maximum antenna height of only 50 feet.

16. The Commission also received on January 26, 1988, an unlabeled statement directed at the applications of Dunn, Kissinger, Tri State, and Skywave. The statement contests the site availability certifications made by these applicants since they had not yet filed special use applications with the Evansville-Vanderburgh County Area Plan Commission. Attached to the statement is a letter dated January 20, 1988, from Beverly M. Behme of the Area Plan Commission Zoning Administration stating that no special use applications for the sites proposed by the noted applicants had yet been received. Also attached to the statement are excerpts from state and local zoning codes which specify that radio and television towers are special uses which must be approved by the Area Plan Commission. The statement also reiterates the allegation made in the petitions that the site chosen by Kissinger and Tri State is zoned with a height restriction.

17. The 19 petitions will be considered as informal objections pursuant to 47 C.F.R. § 73.3587. The anonymous statement does not merit treatment pursuant to 47 C.F.R. § 73.3587 since it is unsigned, but its allegations will be addressed as a matter of course in our consideration of the petitions. The petitions' allegations concerning the compatibility of Kissingers' and Tri State's transmitter proposals with neighboring land uses do not demonstrate noncompliance by either applicant with the Commission's environmental standards since the petitions contain no allegation of any action which may have a significant environmental effect as defined by the Commission's environmental processing standards. *See* 47 C.F.R. 1.1301 *et seq*. Further, the zoning code's requirement of approval of special use applications for the construction of radio towers and the maximum height limitation on Kissinger's and Tri State's proposed site do not cast doubt on the site availability certifications made by Dunn, Kissinger, Tri State, and Skywave. The Commission has long held that an applicant need not demonstrate absolute assurance of site availability--a showing of reasonable assurance that the site is available is sufficient. The Commission has also traditionally held that local requirements for land use will be left to local officials, and that the Commission assumes local authorities will act favorably upon site requests unless a reasonable showing is made that the applicant cannot obtain proper authorization. The petitioners have failed to present such a reasonable showing that zoning approval will not be forthcoming. Furthermore, the Zoning Administration letter does not indicate that special use applications will not be approved in the future. *See, e.g., Heritage Broadcasting Company of North Carolina*, 1 FCC Rcd 1012, 1014 (1986); *El Camino Broadcasting Corp.*, 14 FCC 2d 361 (1968). Accordingly, the 19 petitions will be denied.

18. Bell and Counsellor indicate in amendments filed to their applications on April 30, 1987, and July 23, 1987, respectively, that they will each co-locate their antennas on the existing tower of WIKY-FM, Evansville, Indiana. According to the Commission's database, the accepted geographical coordinates for this tower are 37' 59' *21* " NL, 87' 35' *48* " WL. However, Bell and Counsellor each list the coordinates of the tower as 37' 59' *18* " NL, 87' 35' *50* " WL. Because the location of the specified tower exists as a preprinted symbol on the applicants' topographical transmitter site maps, we can determine that the Commission's records are in error and that the actual coordinates are those specified by the two applicants. However, a further discrepancy exists in the figures provided by the applicants for the overall height of the tower structure above mean sea level (AMSL). Antenna Survey Branch records list this existing structure as having been cleared for 580 feet above ground level (AGL) and 1015 feet AMSL at the corrected coordinates. However, both Bell's and Counsellor's amended applications specify 580 feet AGL and 1010 feet AMSL. Accordingly, Bell and Counsellor shall each be required to submit clarifying amendments to their applications with respect to the noted tower height discrepancy to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. In response to Section VI, FCC Form 301, Hulse and Counsellor indicate that they will each employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), they are required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. However, the EEO programs submitted by Hulse and Counsellor are deficient

Hulse fails to identify specific sources of recruitment specializing in female candidates and Counsellor fails to identify specific sources of recruitment specializing in minority candidates. Accordingly, Hulse and Counsellor will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order. [3]

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below. 22. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1(a). To determine whether Dunn made misrepresentations to the Commission, was lacking in candor in her dealings with the Commission or attempted to deceive or mislead the Commission.

1(b). To determine, in light of the evidence adduced pursuant to issue 1(a) above, whether Dunn is qualified to construct and operate the requested facilities as proposed.

2. If a final environmental impact statement is issued with respect to Dunn in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1.1319 of the Commission's rules.

3. To determine whether Tri State has properly maintained its file for public inspection as required by Section 73.3526 of the Commission's rules, and, if not, whether circumstances exist which warrant waiver of that Section.

4. To determine whether Counsellor had reasonable assurance that its originally specified transmitter site would have been available to it.

5(a). To determine, with respect to Counsellor and its principals, whether they failed to disclose their interests in other pending application(s) as required by Section II, Item 5(a), FCC Form 301.

5(b). To determine, with respect to Counsellor, whether applications in excess of the limit established in Section 73.3555 of the Commission's rules have been filed, in violation of Section 73.3518 of the Commission's rules.

5(c). To determine, in light of the evidence adduced pursuant to issues 5(a) and 5(b) above, whether Counsellor is qualified to construct and operate the requested facilities as proposed.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Hulse IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated in paragraph 2 hereinabove.

24. IT IS FURTHER ORDERED, That, in accordance with paragraph 5 hereinabove, Dunn shall submit the requested amendment to her environmental assessment to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division, within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That, in accordance with paragraphs 3 through 6 hereinabove, Hensley's petition to deny Dunn's application IS GRANTED to the exent indicated above and IS DENIED in all other respects.

26. IT IS FURTHER ORDERED, That, in accordance with paragraphs 9 through 11 hereinabove, Brennan's petition to deny Counsellor's application, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

27. IT IS FURTHER ORDERED, That, in accordance with paragraphs 13 and 14 hereinabove, Hensley's petition to deny Skywave's application IS DENIED.

28. IT IS FURTHER ORDERED, That, in accordance with paragraph 17 hereinabove, the 19 petitions filed against Kissinger and Tri State by Evansville residents ARE DENIED.

29. IT IS FURTHER ORDERED, That, in accordance with paragraph 18 hereinabove, Bell and Counsellor shall each submit clarifying amendments to their applications to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That in accordance with paragraph 19 hereinabove, Hulse and Counsellor shall each submit to the presiding Administrative Law Judge amendments to their Equal Employment Opportunity Programs within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *See* Motion for Extension of Time, filed by Counsellor on March 17, 1988.

[2] Counsellor's subsequent actions of transferring its interests from a general partnership to a purported limited partnership has no effect on this discussion. The Commission's inconsistent application rule, 47 C.F.R. § 73.3518, which governs the maximum number of applications which may be filed by one entity, looks to the applications *at the time they* are filed.

[3] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy our EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-404

In re Applications of

W. Greg Ryberg, Leslie Pope Garnett and Rebecca T. Robbins d/b/a GRR MARKETING (hereafter GRR)	File No. BPH-870313NM
BLESSED FM LIMITED PARTNERSHIP (hereafter Blessed)	File No. BPH-870313NR
BOSE GOWDY (hereafter Gowdy)	File No. BPH-870313MC (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
in New Ellenton, South Carolina
Channel 274A (102.7 MHz)

HEARING DESIGNATION ORDER

Adopted: August 8, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On February 23, 1988, the FM Branch returned Gowdy's application as inadvertently accepted for filing because the site elevations calculated from Sections V-B and V-G of Mr. Gowdy's application did not agree with the value read from his U.S.G.S. 7.5 minute transmitter site map. On March 23, 1988, Gowdy petitioned for reconsideration of this action, arguing that "[i]t can clearly be seen that the elevation of the Bose Gowdy proposed site is 360 feet consistent with BPH-870313MC." In addition, Mr. Gowdy submitted a copy of a 7.5 minute topographic map with his proposed site location plotted on it. After staff review of the site maps contained in both the original application and the reconsideration, it was found that the site elevation plotted on both maps is 370 feet and not the 360 feet claimed in the petition for reconsideration. Accordingly, Gowdy's reconsideration will be denied.[1]

3. *Blessed.* On May 4, 1987, the last day for filing minor amendments as of right in this proceeding, Blessed tendered an amendment to reform the applicant into a limited partnership. As counsel for the applicant noted, the amendment was not signed by one of the partners pursuant to 47 C.F.R. § 73.3513(a)(2). On May 6, 1987, Blessed filed a petition to accept the executed version of the amendment. In its petition, counsel for Blessed stated that the executed amendment was not received in time to effect filing by the close of business on May 4, 1987. Citing *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976), Blessed claims that the filing of the unexecuted document placed all parties on notice as to the contents of the amendment and the filing of the signed amendment two days later cured the procedural defect. In its "Comments" filed November 24, 1987, GRR argued that Blessed "should not receive comparative consideration for the filing of its unexecuted May 4, 1987 amendment within the tenderability period."

4. While Blessed is correct in summarizing the principle stated in *Communications Gaithersburg, Inc.*, it failed to note that the Commission's policy governing the filing of pre-designation amendments has been significantly modified in the 10 1/2 years since the adoption of that item. In 1979, citing the burdensome delays inherent in accepting pre-designation amendments at any point prior to designation, the Commission limited the filing of pre-designation amendments as of right to a specified period (approximately 30-45 days) after public notice in the *Federal Register* of the acceptance for filing of the last-filed mutually exclusive application. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 210 (1979) (commonly known as "the Paglin Procedures"). Six years later, the Commission, in pertinent part, again modified its processing procedures to restrict the filing of pre-designation amendments as of right to a thirty-day period following the issuance of a public notice of acceptance for tender. *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, at paragraph 31, and 47 C.F.R. § 73.3522(a)(6). Blessed offered no explanation for its inability to properly execute its May 4th amendment and, consequently, no justification for acceptance of its May 6th amendment as timely filed. Therefore, it will be considered as late-filed and will be accepted pursuant to Section 1.65. However, any comparative advantage resulting from the amendment will be disallowed.

5. *Other matter.* Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Gowdy IS DENIED and his application IS RETURNED.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Blessed IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *Teton Broadcasting*, 1 FCC Rcd 518, 521 n.5 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-405

In re Applications of

JAMES BOYD PATE (hereafter Pate) — File No. BPH-870903MC

Eloise F. Thomley, Kermit E. Minga & Geneva H. Dove, d/b/a WINFIELD BROADCASTING (hereafter WB) — File No. BPH-870909MJ

WILLIAM EDWARD NICHOLS (hereafter Nichols) — File No. BPH-870910MG

WINFIELD RADIO JOINT VENTURE (hereafter WRJV) — File No. BPH-870910NX

JOHN SELF (hereafter Self) — File No. BPH-870910OD

For Construction Permit for a New FM Station in Winfield, Alabama on Channel 290A (105.9 MHz).

HEARING DESIGNATION ORDER

Adopted: August 5, 1988; Released: September 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Pate.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Although Pate is the individual applicant and sole proprietor, he has not completed Item 4 correctly. In his application, Pate gives a post office box number as his residence address. Accordingly, Pate must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *WB.* In response to Section II, Item 6(a), FCC Form 301, WB reported in Exhibit I that its general partner, Eloise F. Thomley, intends to divest her 10 percent common stock interest in SIS Sound of Fayetteville, Inc., licensee of Station WLDX(AM), Fayetteville, Alabama, and terminate her position as General Manager of WLDX(AM), in the event the subject application is granted. Accordingly, an appropriate condition reflecting this commitment will be specified below.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Pate shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That in the event of the grant of WB's application, the construction permit shall be conditioned as follows:

Prior to commencement of program test authorization, permittee shall certify to the Commission that Eloise F. Thomley has divested her interest in SIS Sound of Fayetteville, Inc. and has terminated her employment at WLDX(AM), Fayetteville, Alabama.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

FAYE & RICHARD TUCK, INC. KBEC, Waxahachie, Texas	**MM DOCKET NO. 83-212** File No. BP-810127AJ
BLUEBONNET RADIO BROADCASTERS, INC. Plano, Texas	**MM DOCKET NO. 83-215** File No. BP-810511AL
CENTURY BROADCASTING CORPORATION Garland, Texas	**MM DOCKET NO. 83-216** File No. BP-810511AM
DONTRON, INC. KPBC, Garland, Texas	**MM DOCKET NO. 83-218** File No. BP-810511AP

For Construction Permit for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1988; Released: September 8, 1988

By the Commission:

I. INTRODUCTION

1. This adjudicatory proceeding raises complex questions regarding the award of dispositive preferences under 47 U.S.C. § 307(b) to applicants in a comparative licensing proceeding who propose to provide the first local transmission service for a community that is located in, or near, a large metropolitan area. At issue in this case is the application of the so-called *Huntington* doctrine, which precludes the grant of such dispositive preferences in certain circumstances. In particular, this case raises questions as to whether the Census Bureau's concepts of "Urbanized Area" or "Standard Metropolitan Statistical Area" (SMSA) are relevant in determining whether a proposal for a community in a metropolitan area merits a dispositive preference under section 307(b), and what evidentiary showing is required to deprive an applicant of such a preference under the *Huntington* doctrine.

2. This case also raises the question of whether the Commission must ignore comparative factors affecting efficient use of the spectrum whenever an applicant proposes to bring first local transmission service to a community that previously had no broadcast stations licensed to it. As a matter of policy, such a result would cause some concern in light of the great proliferation of broadcast outlets since Congress last amended section 307(b) in 1936. In view of this growth in media coverage, the rationale for subordinating comparative differences among the applicants to the needs of the competing communities is not as compelling as it once was. Therefore, greater relevance attaches over time to the Court of Appeals' admonition that the implementation of section 307(b) should reflect that "[t]he ultimate touchstone for the FCC is . . . the distribution of service, rather than of licenses or of stations; the constituency to be served is people, not municipalities." *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

3. As the proliferation of stations has blanketed the nation with broadcast *reception* service, the priority to provide local *transmission* service has assumed increasingly decisional significance in AM licensing proceedings. Large cities with lucrative advertising markets have had local transmission service for years. Therefore, an applicant for a new AM frequency who hopes to compete in one of those advertising markets by projecting an AM signal over the entire metropolitan area can increase the probability of being awarded a license if it proposes a nearby town or suburb as its community of license, rather than the central city. In this case, for example, none of the applicants proposes Dallas or Fort Worth as its community of license, even though each applicant proposes a service contour that, at least during the peak daytime listening hours, would extend over much of Dallas and Fort Worth and thus would make the station attractive to advertisers wishing to reach audiences in those cities.

4. We no longer have a presumption that applicants proposing suburbs of large cities as their communities of license do not intend to serve the needs and interests of those communities. *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436, 450-51 ¶ 30 (1983). However, it would be naive for us to ignore that granting a dispositive preference to an applicant proposing first local transmission service near a metropolitan center, without regard to the efficiency of the applicant's proposed use of the spectrum, has the potential to produce anomalous results that would seem to contravene the original statutory mandate of section 307(b) "to provide a fair, efficient, and equitable distribution of radio service" to "the several States and communities." Nevertheless, despite the difficulties in this area, we will proceed with this case according to existing Commission precedent that a preference for local transmission service may be dispositive without regard to the comparative attributes of competing applicants.

5. With these concerns in mind, we turn to the case before us. Four applicants -- Faye and Richard Tuck, Inc., Bluebonnet Radio Broadcasting, Inc., Century Broadcasting Corporation, and Dontron Broadcasting Corporation -- filed mutually exclusive applications for a new AM station on 770 kHz near Dallas, Texas. The applicants specified three different communities as their communities of license, and the Commission specified an issue to determine whether any of these communities is entitled to a dispositive preference under section 307(b). *Hearing Designation Order*, MM 3002 (Mar. 21, 1983).

6. Two of the communities -- Plano and Garland -- are within the Dallas-Fort Worth Urbanized Area. The third community -- Waxahachie -- lies outside the Urbanized Area but inside the Dallas-Fort Worth SMSA. The community of Plano already has a full-time AM station licensed to it. On the other hand, no radio station is licensed to serve Garland, but it has a UHF television permit. Finally, Tuck's daytime-only AM station KBEC is the only broadcast station currently licensed to serve Waxahachie.

7. In an initial decision, 103 FCC 2d 949 (1985), Administrative Law Judge Joseph P. Gonzalez determined that the applicants for Garland and Plano proposed such high-powered regional AM service to Dallas-Fort Worth that no meaningful section 307(b) distinctions could be made. Tuck proposed to operate at only 1 kw day and night and would serve significantly fewer people than the competing proposals for Garland and Plano. The ALJ found that Tuck's proposal to bring first local nighttime service to Waxahachie, which is approximately 30 miles south of Dallas-Fort Worth, warranted a dispositive section 307(b) preference. Under the contingent comparative issue, the ALJ found that Tuck, with 50 percent full-time integration and no media interests, would be the comparatively superior applicant.

8. The Review Board concluded that none of the competing applicants was entitled to a dispositive section 307(b) preference, that Tuck was the superior applicant under the contingent comparative issue, and that the grant of Tuck's application would best serve the public interest. 103 FCC 2d 936 (1986). Relying upon the Census Bureau's inclusion of Waxahachie, along with Garland and Plano, in the Dallas-Fort Worth SMSA, the Board determined that Waxahachie was an integral part of the larger metropolitan area for section 307(b) purposes. In doing so, the Board noted that the Census Bureau includes Garland and Plano but not Waxahachie in the Dallas-Fort Worth Urbanized Area.

9. Now before us are: (a) a Contingent Application for Review, filed June 9, 1986, by Tuck; (b) an Application for Review, filed June 9, 1986, by Bluebonnet; (c) an Application for Review, filed June 9, 1986, by Century; (d) an Application for Review, filed June 9, 1986, by Dontron; (e) an Opposition to Application for Review, filed July 15, 1986, by Tuck; (f) an Opposition to Applications for Review, filed July 15, 1986, by Bluebonnet; (g) an Opposition to Tuck's Contingent Application for Review, filed July 15, 1986, by Century; (h) an Opposition to Bluebonnet's Application for Review, filed July 15, 1986, by Century; and (i) an Opposition to Dontron's Application for Review, filed July 15, 1986, by Century.

10. In their Applications for Review, Dontron and Century challenge the Review Board's determination that, pursuant to *Huntington*, neither is entitled to a dispositive preference under section 307(b) for bringing first local radio transmission service to the community of Garland. Tuck claims in its Contingent Application for Review that *Huntington* does not apply to its Waxahachie proposal, and that it is entitled to a dispositive preference under section 307(b) for its proposal to bring first local transmission service to Waxahachie at night. Bluebonnet, which seeks to serve Plano, argues that *Huntington* applies to the proposals for Waxahachie and Garland, that none of the applicants deserves a dispositive preference for section 307(b), and that therefore the Commission should resolve this proceeding based on the standard comparative issue.

11. For the reasons set forth below, we find that a remand is necessary to resolve the questions raised in the pending applications for review. Changes in the Commission's rules raise a question of fact as to whether Tuck's proposal will bring first local transmission service to Waxahachie at night, a fact that is central to whether Tuck is entitled to a section 307(b) preference. In addition, recent Court of Appeals opinions affect the Review Board's approach to the *Huntington* issue in this case, and make it appropriate for us to take this opportunity to address concerns raised by the court.

II. NEWLY AUTHORIZED NIGHTTIME SERVICE

12. The Commission recently made changes in its AM technical rules so as to permit certain daytime-only stations to operate both day and night. *Unlimited-time Operation by Existing AM Daytime-Only Radio Broadcast Stations* ; *Discontinuance of Authorization of Additional Daytime-Only Stations* ; *Minimum Power of Class III Stations*, 2 FCC Rcd 7113 (1987). There the Commission indicated that it would issue orders to daytime-only AM licensees qualifying under the revised rules for nighttime operation "to show cause why their licenses should not be modified to specify nighttime operation." *Id.* at 7118 ¶ 33.

13. Tuck is the licensee of daytime-only AM station KBEC in Waxahachie. It seeks to change frequencies and to operate station KBEC both day and night in Waxahachie on 770 kHz. However, station KBEC qualifies for nighttime operation under our revised rules, and we issued a show-cause order to the station specifying that the station must operate at night and that its nighttime operation may not exceed 65 watts. The station has not notified the Commission that nighttime operation at 65 watts is impossible, and the deadline for such notification has passed.

14. In view of this change in circumstances, it appears that KBEC will now be able to provide nighttime service to Waxahachie even if Tuck's application to change frequencies is denied. As station KBEC already serves Waxahachie during the day, Tuck's claim to a dispositive section 307(b) preference depends entirely on nighttime service. Thus, the rule change raises a question as to whether Tuck is still eligible for a preference for local transmission service. However, as noted above, the Commission has issued a show-cause order specifying that KBEC may use only 65 watts of power at night, which is considerably less than the 1 kw that Tuck proposes to use at night if its application for an AM station on 770 kHz is granted.

15. Because the ALJ closed the record in this proceeding before the Commission amended its AM rules to permit limited nighttime operation by daytime-only stations, there is no record evidence as to what areas and population will now receive nighttime service from KBEC. Under these circumstances, we cannot determine from the record before us what effect KBEC's newly authorized nighttime operation has on the section 307(b) issue. Accordingly, without regard to whether *Huntington* applies to the Waxahachie proposal, we must remand this proceeding to the ALJ with instructions to adduce evidence and prepare a supplemental initial decision on this question.

III. SECTION 307(b) PREFERENCE

16. Having concluded that a remand is necessary on the nighttime question, we believe that it is also appropriate for us to give guidance on the *Huntington* issue. After the Review Board's decision in this case, the Court of Appeals considered three cases raising the question at issue in this case -- that is, the applicability of the *Huntington* exception to proposals for communities located near a large metropolitan area. *Arizona Number One Radio, Inc.*, 2

FCC Rcd 44 (1987), *aff'd mem. sub nom. Interstate Broadcasting System v. FCC*, 836 F.2d 1408 (D.C. Cir. 1988); *Debra D. Carrigan*, 100 FCC 2d 721, 728-31 (Rev. Bd. 1985), *review denied*, 104 FCC 2d 826 (1986), *aff'd mem. sub nom. Bernstein / Rein Advertising v. FCC*, 830 F.2d 1188 (D.C. Cir. 1987); *New Radio Corp. v. FCC*, 804 F.2d 756, 760 (D.C. Cir. 1987). The Court of Appeals upheld the Commission in all three cases, but it observed that "the FCC's policy of assigning licenses to communities in metropolitan areas once again appears to be in a state of confusion." *New Radio*, 804 F.2d at 762.

17. In *New Radio*, the Court of Appeals specifically focused on "confusion concern[ing] the weight that the FCC places on the regional nature of the proposed service and on the Census Bureau's concepts of an 'Urbanized Area' and a 'Standard Metropolitan Statistical Area'" in *Huntington* cases. *Id.* Because the Review Board relied on those concepts in this case, we take this opportunity to address the court's concerns in the context of this case. For the reasons set forth below, we find that the Board's reliance on Waxahachie's location within the Dallas-Fort Worth SMSA was improper.

18. As a matter of fairness, we will permit the parties, on remand, to supplement their evidentiary showings on whether Waxahachie, Plano, and Garland are integral parts of the Dallas-Fort Worth metropolitan area for purposes of section 307(b). In *New Radio*, the Court of Appeals concluded that "the present state of the law surrounding the *Huntington* exception sometimes appear[s] to be a muddle," but that this "muddle" did not disadvantage the petitioner because it had not properly raised *Huntington*. 804 F.2d at 763. The parties in this case properly raised *Huntington* with respect to Waxahachie and Garland, and therefore we have no comparable assurance that the confusion on this question has not disadvantaged the applicants in this case. Thus, we will permit the parties to adduce further evidence as to whether *Huntington* applies to the proposals for Garland or Waxahachie. As Bluebonnet never claimed a section 307(b) preference for its proposal to serve Plano, the *Huntington* issue was not decisionally significant with respect to that applicant. However, in view of the new standards announced here, we will, as a matter of fairness, also permit the parties to adduce evidence on whether the *Huntington* exception applies to Plano.

A. Local Transmission Service and the Section 307(b) Framework

19. Section 307(b) requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service . . . ." 47 U.S.C. § 307(b). Thus, whenever applicants specify different communities of license for their proposed stations, the Commission first compares the needs of the respective communities for radio service. Applicants for AM channels, such as the frequency at issue in this case, may propose to serve any community where their operations will not cause objectionable interference to, or receive such interference from, existing stations. In contrast, FM and television frequencies are assigned to specific communities. Until 1983, applicants could generally propose FM or television operations from any communities within a specified distance from the community to which the channel had been assigned. That policy was changed in *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

20. The Commission has assessed the need for radio service primarily in light of the facilities presently available in the proposed communities and the relative population of the communities. *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 109, *recon. denied*, 80 FCC 2d 140 (Rev. Bd. 1980); *Kent - Ravenna Broadcasting Co.*, 44 FCC 2603 (1961). The need for service concerns both the number of stations that can be received in a given area (reception service) and the availability of local outlets for self-expression in the community (transmission service). The Commission seeks to provide, in order of priority: (1) first full-time aural reception service; (2) second full-time aural reception service; (3) first local transmission service; and (4) additional services. The second and third priorities have equal weight. *See FM Channel Policies/Procedures*, 90 FCC 2d 88, 91-93 (1982).

21. In assessing the relative need for service, the Commission presumes that the unserved community with the largest population has the greatest need for a station. *See* , e.g., *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 709 (Rev. Bd. 1982). If one community's need for service is sufficiently greater so as to give that community a decisive preference, only the applicant(s) specifying that community are given further consideration. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955). Thus, the Commission generally has preferred a community with no local transmission service over a community that already has a local station without regard to the comparative ability of each applicant to serve its respective community. In other words, where the Commission awards a dispositive section 307(b) preference based upon the communities' need for local transmission service, it does not reach the standard comparative issue. *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977).

B. The Huntington Doctrine

22. In those exceptional cases, however, where competing applications are filed for separate communities that are dependent upon, and contiguous to, a central city, and the applicants propose sufficient power to serve the entire metropolitan area, we treat that entire metropolitan area as one community for section 307(b) purposes. *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 35 (D.C. Cir. 1951). Accord, *Debra D. Carrigan*, 100 FCC 2d at 728-31. Under these circumstances, we presume that the need for local self-expression in an ostensibly separate community will be adequately met by a broadcast facility licensed to serve any one of the competing communities. *Id.* at 728-31. Accordingly, we award none of the competing communities dispositive section 307(b) preference, and we base our selection among the mutually exclusive applicants on the standard comparative criteria rather than section 307(b) considerations. *See Allentown Broadcasting*, 349 U.S. at 361-62.

23. The *Huntington* doctrine is a limited exception to the usual section 307(b) presumption that every separate community needs at least one local transmission service. Accordingly, we are reluctant to extend it beyond its original application -- that of a central city and its contiguous suburbs. As the Court of Appeals indicated in *Beaufort County*, 787 F.2d at 649, " *Huntington*'s premise is that where integrally related communities constitute a sin-

gle metropolitan transmission service area, individual communities' needs should be presumed satisfied by the aggregate of stations in that area."

24. Because *Huntington* is an exception to section 307(b), the party seeking to have us apply it against a competing applicant generally bears the burden of proof on this issue. As the Court of Appeals has explained, "[w]hile it may be assumed that the Commission may consider the *Huntington* exception on its own motion in an appropriate case, it is generally recognized that the burden of invoking an exception will fall on the party seeking to apply it." *New Radio*, 804 F.2d at 760. Thus, we recognize a community's presumptive need for local transmission service under section 307(b) unless there is substantial evidence that the communities at issue are interdependent.

25. By the same token, the Court of Appeals has emphasized that the Commission has the burden of justifying any extension of the *Huntington* exception. In *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199, 201 (D.C. Cir. 1965), the court held that "[t]he use of the 'exceptional' rule of *Huntington* in this case is permissible only if the Commission clearly recognizes it as an extension and gives adequate reasons for it." Accord, *Beaufort County*, 787 F.2d at 654 (Commission not required to apply *Huntington* to two small contiguous communities not located in a metropolitan area).

C. The Standard for Applying Huntington

26. In determining whether a party has satisfied its burden of establishing that *Huntington* should apply, the Commission has traditionally considered the following four criteria: (1) power and class of station; (2) interdependence or independence of the specified "community" to the central city of the "urbanized area"; (3) size and proximity of the specified "community" to the central city; and (4) signal population coverage and relevant advertising market. *Arizona Number One*, 2 FCC Rcd at 45 n.11; *Debra D. Carrigan*, 100 FCC 2d at 729 ¶ 10. *See* also *New Radio*, 804 F.2d at 761; *Miners*, 349 F.2d at 201-02 n.6.

27. The Court of Appeals has frequently criticized our *Huntington* doctrine. *See* , e.g., *Miners*, 349 F.2d at 201-02 n.6. As the court also noted in *New Radio*, there is some confusion as to what weight these criteria (particularly the "regional nature of the proposal) have in determining whether the *Huntington* exception will apply, and what weight the Census Bureau's concepts of Urbanized Area and SMSA have in delineating "community" in a major metropolitan area for section 307(b) purposes. 804 F.2d at 762.

28. We take this opportunity to address these concerns. Our intention is to clarify, rather than to expand or narrow, the scope of the *Huntington* exception. After careful consideration, we conclude, for the reasons set forth below, that proposed power and class of station is not pertinent in deciding whether *Huntington* should apply. We also find that relevant advertising market should be considered as an element of interdependence and not as a separate criterion under *Huntington*. The ultimate focus of our analysis in these cases is the characteristics of the specified community rather than the technical aspects of the applicant's proposal. Thus, the most important consideration under *Huntington* is the relationship between the specified and the central city of the Urbanized Area. In comparison, evidence on the remaining criteria -- the size and proximity of the specified community to the central city, and signal population coverage -- is pertinent, but has less significance than evidence of interdependence.

29. *Power and Class of Station* : The technical nature of a proposal -- that is, the station's power and class -- has never been deemed sufficient, standing alone, to trigger the *Huntington* exception. Indeed, the Court of Appeals has overturned *Huntington* determinations that it found were based exclusively on such technical factors. *Miners*, 349 F.2d at 201-02 n.6; *Pasadena*, 555 F.2d at 1050-51. Its analysis in *Beaufort County*, where our refusal to apply *Huntington* to two rural communities was upheld, confirms that, in the absence of evidence that a specified community is a mere appendage of a metropolitan area, the *Huntington* exception does not apply. 787 F.2d at 654.

30. We believe that power and class of station are no longer relevant in determining whether to invoke *Huntington*. In recent years, we have experienced increased demand for electronic media of all types. Because of this increased demand, the market has become more competitive and the need for regulation less critical. In accordance with these changes in the marketplace, we have taken various steps to foster maximum utilization of the spectrum. For example, we now allow stations to upgrade service to the public by increasing power. *See Amendment of Part 73 of the Commission's Rules Concerning the Nighttime Power Limitations for Class IV AM Broadcast Stations*, 55 RR 2d 1015, 1016 ¶ 4 (1984).

31. In our view, focusing on the power and class of frequency under *Huntington* undercuts this public interest objective. In this regard, considering this criterion could benefit an applicant proposing less than maximum utilization of the frequency. Power and class of station are matters that are largely within the discretion of the broadcast applicant, and we do not wish to give applicants an incentive for proposing deliberately limited service contours or otherwise encourage inefficient use of the spectrum.

32. In eliminating this criterion from the *Huntington* analysis, we emphasize that we are not abandoning our commitment to providing local transmission service to as many communities as possible. We remain cognizant of a community's need for an outlet for local self-expression and of our statutory responsibility to allocate stations in a fair and equitable manner. As the court has indicated, we run afoul of our responsibilities under section 307(b) when we subordinate a community's need for local transmission service to efficiency considerations, and "allot [a] frequency 'so as to provide service to the greatest population and area possible.'" *See Pasadena*, 555 F.2d at 1048. Nevertheless, section 307(b) requires that we make an efficient, as well as a fair and equitable, distribution of licenses, and a policy that could favor inefficient proposals does not serve the public interest. Accordingly, we conclude that it is inappropriate for us to consider the power and class of station in determining whether to apply *Huntington* in radio cases[1] because such consideration actually gives broadcast applicants an incentive to specify deliberately small service contours. Cf. *National Association of Broadcasters*, 740 F.2d at 1198-99 (Not every communications service that the Commission authorizes must be tied to the local service concept).

33. *Interdependence with and Proximity to Central City* : In the typical *Huntington* case involving a central city and its contiguous suburbs, the second and third criteria -- the relationship between the specified community and the

central city, and their proximity and relative sizes -- are generally decisive in determining whether the *Huntington* doctrine should apply. However, the Court of Appeals has cautioned that we may not focus exclusively on the size and proximity of the communities involved without also considering evidence of the interdependency between the specified community and the central city. *New Radio*, 804 F.2d at 761. *See* also *Beaufort County*, 787 F.2d at 653-54 (Without evidence of the interrelationship between the communities, the Commission is not required to invoke *Huntington).*

34. In accordance with the court's admonitions in *New Radio* and in *Beaufort*, we hold that the relationship between the specified community and the central city is the critical consideration in deciding whether *Huntington* applies. In the absence of persuasive evidence that two communities share needs and interests we have no basis for inferring that one community's need for local transmission service will be satisfied by a station licensed to the other community. Although interdependence is the most important consideration under *Huntington*, the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city. When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a *Huntington* exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city.

35. In concluding that interdependence is the most important criterion under *Huntington*, we simply adjust our standards to reflect what has been our experience in this area. By reordering the *Huntington* criteria in this manner, we are not fundamentally changing our approach in these cases. However, we recognize that it is difficult to demonstrate the relationship between ostensibly separate communities, and that the evidence necessary to demonstrate such relationship will vary depending on the circumstances in a particular case. In this regard, we deem it useful to delineate those characteristics most likely to reflect such interdependence. In doing so, we emphasize that our list is not exhaustive, and that there is no set of indicia of interdependence that must be shown in order to invoke the *Huntington* exception.

36. In assessing the interdependence of the specified community with the central city, we will consider the following characteristics: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries.

37. Two aspects of interdependence warrant further comment. First, we note that few cases have focused on relevant advertising market. This is because parties, in this and other cases, have adduced virtually no evidence analyzing relevant advertising market. Nevertheless, we believe that such evidence may be probative of whether a community is independent of a central city for purposes of the *Huntington* doctrine. In this regard, we are particularly interested in evidence showing a commonality of interest based on mutual economic reliance between the specified community and the larger metropolitan area. Thus, parties seeking to invoke *Huntington* may adduce evidence on the extent to which advertisers in the central city utilize advertising outlets in the smaller community, and the extent to which advertisers in the smaller community utilize advertising outlets in the central city.[2] We will consider such evidence in determining whether the specified community is interdependent with, or independent of, the larger metropolitan area.

38. Second, we will carefully scrutinize evidence that the specified community depends on the larger metropolitan area for various public services. We recognize, however, that to the extent that a community's inclusion within a larger jurisdiction reflects economic realities, evidence that a community relies upon a larger jurisdiction to provide certain services may not be particularly probative of whether that community shares needs and interests with other communities within the larger metropolitan area. [3] Thus, we will consider rebuttal evidence showing that communities in metropolitan areas tend to cooperate in providing a particular service. In doing so, it is not our intent to ascertain why a community has or has not cooperated with neighboring communities in providing certain services to its residents. However, where the record reflects that nearby municipalities have cooperated in providing a certain service, the fact that the specified community does not participate with neighboring municipalities in the joint production of local public goods would be strong evidence of its independence from the larger metropolitan area.

39. *Signal Population Coverage:* Although power and class of station are no longer relevant under *Huntington*, we will continue to consider signal population coverage under certain circumstances. Under our previous approach to this criterion, an applicant was able to avoid the *Huntington* analysis by choosing to cover fewer people by operating at less than maximum power and thereby receive a section 307(b) preference.[4] However, such an operation would be an inefficient use of the spectrum, contrary to the mandate of section 307(b). Hence, in order to avoid such situations in the future, we will now only consider the number of people covered by an applicant's proposed coverage if the applicant's proposal is at maximum power. If the proposal is not at maximum power, the number of people covered by the applicant's proposed contour will not factor into the *Huntington* analysis, and we will place greater reliance on the other factors discussed herein.

40. In sum, we have deleted one criterion of the test for invoking Huntington: power and class of station. We have also eliminated relevant advertising market as a separate criterion under *Huntington*, but we will consider such evidence as one element pertinent to the interdependence

criterion. In accordance with our past experience in this area, as well as various court opinions, we have held that interdependence is the most important criterion under *Huntington*. In order to clarify this difficult area, we have provided an illustrative list of indicia that we deem pertinent in assessing the relationship between the specified community and the central city. Finally, we have indicated that evidence on the remaining criteria -- size and proximity of the specified "community" to the central city; and signal population coverage -- is relevant to, but not necessarily dispositive of, the *Huntington* issue.

D. Defining "Community" Under the Huntington Exception

41. Having determined that interdependence is the most important criterion under *Huntington*, we turn now to the second concern raised by the court in *New Radio:* The weight given to the Census Bureau's SMSA and Urbanized Area concepts in delineating a metropolitan area community for section 307(b) purposes. As the Court of Appeals has suggested, the party seeking to invoke the *Huntington* exception may not resort to a "metropolitan area" presumption in order to meet its burden of proof. *New Radio*, 804 F.2d at 760-61. The Commission does not presume, even in the typical case involving a central city and its contiguous suburbs, that the needs and interests of communities in a particular metropolitan area are indistinguishable, or that "all communities in metropolitan areas are merely undifferentiated components of larger metropolitan areas." *Id.* at 761.

42. In this regard, the Commission has explicitly refused to redefine a community in a metropolitan area to mean, for the purposes of section 307(b), "the community actually receiving service as a result of the power proposed . . . [rather than] the community specified on the application." *Suburban Community Policy*, 93 FCC 2d at 457.

43. However, the Commission has issued a notice of proposed RuleMaking, proposing to adopt a metropolitan area concept in delineating the geographic boundaries of a "community" for the purposes of section 307(b). *Section 307 (b) Preferences Within Metropolitan Areas*, 48 Fed. Reg. 19428 (proposed Apr. 29, 1983), RR Current Service 53:305 (hereinafter cited as *Metropolitan Areas)*. The Commission sought comments on whether the Census Bureau's concepts of Urbanized Area or SMSA, or some other physical delineation, would be an appropriate "community" for section 307(b) purposes. *Id.* at 19431. Pending action on the RuleMaking, the Commission has continued to use the traditional criteria for applying the *Huntington* doctrine on a case-by-case basis. *Debra D. Carrigan*, 100 FCC 2d at 731 n.13.

44. The Census Bureau defines an Urbanized Area as a "separation of urban and rural population in the vicinity of the larger cities." *Metropolitan Areas*, 48 Fed. Reg. at 19431. The criteria for Urbanized Area are: (a) a central city of 50,000 inhabitants or more; or (b) twin cities, that is, cities with contiguous boundaries with a combined population of 50,000, with the smaller community having a population of at least 15,000; or (c) surrounding incorporated communities of 2500 or more or areas of an urban nature based upon population density and land utilization. *Id.* On the other hand, the Census Bureau defines an SMSA as being made up of a county or a group of contiguous counties surrounding a city of 50,000 or more population. *Id.*

45. Thus, the Census Bureau's SMSA concept encompasses a larger area than its Urbanized Area definition and it may include considerable amounts of rural territory that lie outside the Urbanized Area.

Adopting the broader SMSA concept as the standard for a metropolitan area community in section 307(b) cases would effectively mean that, regardless of its relationship to the central city, no community in a densely populated area, such as the California coast from Los Angeles County to the Mexican border, could ever receive a preference on section 307(b) grounds.

46. Under these circumstances, we conclude that a community's location within the SMSA is not an adequate substitute for record evidence that the specified community is interdependent with the central city. As the Court observed in *New Radio*, 804 F.2d at 762, the Board mentioned the SMSA concept in connection with the *Huntington* exception in *Debra D. Carrigan*, 100 FCC 2d at 736. In *Carrigan*, the Commission upheld the application of *Huntington* to all communities in that case. 104 FCC 2d at 828-29 ¶ 5. However, the Commission has never specifically endorsed the use of the SMSA concept in *Huntington* cases.

47. Moreover, neither the Board nor the Commission relied upon the suburb's location within the Las Vegas SMSA in determining that *Huntington* should be invoked in *Carrigan*. Rather, the determination to apply *Huntington* in that case turned upon the four standard *Huntington* criteria set forth in paragraph 26 above. There, the competing communities were all within five miles of each other, and all the applicants proposed to cover the same populations and areas from the same transmitter site. In addition, substantial evidence in the record reflected that the suburb in *Carrigan* -- Paradise, Nevada -- was culturally, politically, and economically dependent on Las Vegas.

48. Because the Census Bureau's Urbanized Area encompasses far less territory than the broader SMSA, we find that the Urbanized Area more accurately defines a metropolitan area "community" for section 307(b) purposes. As *Huntington* is a very limited exception to section 307(b), we are ever wary of extending it beyond the doctrine's original premises concerning the overlapping transmission needs of a central city and its contiguous suburbs. The record before us in this adjudicatory proceeding does not demonstrate that such an extension would serve the public interest. However, using the Urbanized Area concept in our *Huntington* analyses does not, in our view, impermissibly extend *Huntington*. Thus, in order to alleviate the confusion in this area, we believe that, pending action on the matters under consideration in the *Metropolitan Areas* RuleMaking, the public interest would be best served by using the Urbanized Area concept in connection with a *Huntington* analysis as the standard for defining a metropolitan area "community" in section 307(b) adjudicatory cases.

49. In concluding that Urbanized Area is relevant in *Huntington* determinations but that SMSA is not, we in no way prejudge the outcome of the application of the *Huntington* doctrine to this case. We hold only that Urbanized Area is an appropriate definition of "community" under *Huntington*, but that *Huntington* does not automatically encompass all communities within the SMSA. In other words, a party may not rely on a community's location within the SMSA to meet its burden of showing that the

community is an integral part of a homogenous metropolitan area. Rather, the party seeking to have us apply *Huntington* to a community outside the Urbanized Area must affirmatively show that there is sufficient dependence on the central city to support a public interest finding that the given community's local transmission needs can be adequately satisfied by stations licensed to other communities within the larger metropolitan area.

50. As set forth below, we are not persuaded that the record before us warrants invoking *Huntington* against any of the applicants in this case. On remand, the parties seeking to apply *Huntington* against Tuck or against the other applicants are free to present additional evidence on any of the criteria set forth in paragraph 40 above. The affected applicants are likewise free to present rebuttal evidence on any of the criteria.

51. By virtue of Waxahachie's location outside the Urbanized Area, the parties seeking to invoke *Huntington* against Tuck face a heavier burden of proof than those seeking to invoke *Huntington* against the applicants for Garland or Plano. Nevertheless, we do not foreclose the possibility that on remand the parties seeking to apply *Huntington* against Tuck will be able to affirmatively demonstrate that Waxahachie, despite its location outside the Urbanized Area, is interdependent with the larger Dallas-Fort Worth metropolitan area.

52. Where, as in this case, competing applicants specify different communities, the *Huntington* analysis will vary according to the attributes of each community. In this case, the evidence on remand may support applying *Huntington* to all three, to two, to only one, or to none, of these communities. In the event that *Huntington* applies to only one or to two of these communities, its application would narrow, rather than expand, the choice of applicants. In *Miners*, the Court of Appeals criticized us for applying *Huntington* in a case where the doctrine narrowed rather than expanded the Commission's choice of applicants. 349 F.2d at 201 & n.6. However, notwithstanding the Review Board's suggestion, the Court of Appeals' decision in *Miners* does not establish that *Huntington* can be invoked only where it eliminates all section 307(b) distinctions among the applicants. Nor does *Miners* preclude us from making *Huntington* distinctions among communities based on their location within (or outside) the Urbanized Area.

53. *Miners*, unlike the case before us, involved three communities in the Pittsburgh Urbanized Area. The Commission determined that *Huntington* applied to the proposal for Ambridge-Aliquippa, but that it did not apply to the competing proposal for nearby Monroeville. Accordingly, the Commission awarded the Monroeville applicant a dispositive preference under section 307(b) for first local transmission service. *Monroeville Broadcasting Co.*, 36 FCC 296, 297 (1964).

54. The Court of Appeals reversed the Commission. *Miners*, 349 F.2d at 200. It found that the Commission had focused almost exclusively upon the technical aspects of the two proposals, without explaining why other criteria apparently relevant under *Huntington* -- such as size, distance, and relationship to the central city -- were not considered. *Id.* at 201-02 & n.6. Although the Court of Appeals did note that the Commission's application of *Huntington* to only two of the specified communities had the effect of narrowing rather than expanding the choice of applicants, it explicitly invited the Commission to justify this "extension" of the *Huntington* doctrine. *Id.* at 201.

55. As we observed in *Debra D. Carrigan*, 104 FCC 2d at 829, *Huntington* generally enlarges the choice of applicants. This is because a suburban proposal is not excluded from full consideration under the standard comparative issue, as would be the case if *Huntington* is not invoked to defeat an applicant's dispositive section 307(b) preference for first local transmission service. Nevertheless, *Huntington* was not intended to eliminate all section 307(b) distinctions among competing applicants, and there may be cases where section 307(b) considerations remain paramount. Consequently, the determination to apply *Huntington* must ultimately depend upon the characteristics of a particular proposal without regard to the nature of a competing proposal.

56. We perceive no rational basis for restricting *Huntington* to situations where all of the competing proposals can be characterized as proposals for the larger metropolitan area. Nor can we, consistent with our statutory responsibility under section 307(b), permit suburban proposals for communities within the Urbanized Area, such as those for Garland and Plano, to defeat the transmission needs of an outlying community, such as Waxahachie, without regard to evidence on the criteria set forth in paragraph 40 above.

E. The Competing Proposals in this Case

57. With these general precepts in mind, we turn briefly to the facts in this case. The competing communities are Waxahachie, Garland, and Plano. The only station licensed to serve Waxahachie is Tuck's daytime-only AM station, KBEC. There is no broadcast station licensed to serve Garland, but the Commission awarded a construction permit for a new UHF television station to operate on UHF television channel 23 in Garland. Finally, Plano already has a full-time radio station.

1. *The Plano Proposal*

58. As noted above, Bluebonnet proposes to serve the community of Plano. It has not sought a preference under section 307(b) for local transmission service inasmuch as that community already has a full-time AM station for local self-expression. In fact, Bluebonnet has argued throughout this proceeding that none of the applicants is entitled to a section 307(b) preference, and that the Commission should resolve this proceeding based on the standard comparative issue.

59. We discern no reason why Bluebonnet would want to change its theory of the case at this time and request a dispositive section 307(b) preference for its proposal to serve Plano. Ordinarily, we would not permit an applicant to claim a dispositive section 307(b) preference for the first time at this late date. *See New Radio*, 804 F.2d at 760, where the Court of Appeals held that an applicant that chose to present its entire case based on a section 307(b) claim and did not raise *Huntington* before the ALJ or the Review Board waived the right to raise *Huntington* for the first time before the Commission.

60. Nevertheless, in view of the modified standards announced here, Bluebonnet may now wish to request a dispositive section 307(b) preference for bringing an additional local transmission service to Plano. In that event, we would, as a matter of fairness, permit the other applicants to present evidence on whether *Huntington* also applies to Bluebonnet's proposal for Plano. Under these

circumstances, we see no reason to consider at this time whether the record supports the Board's application of *Huntington* against Bluebonnet.

2. *The Garland Proposals*

61. The 770 kHz frequency at issue in this proceeding is available for either wide-area or localized service. *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 1371-72, *recon.*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982). Based upon the power specified by the Garland applicants, the Review Board concluded that these applicants proposed essentially regional services. However, as noted above in paragraph 28, we have concluded that the power and class of the proposed station is not relevant in determining whether *Huntington* applies.

62. The size and proximity of Garland to the central city favors applying *Huntington* to the Garland proposals. In this regard, the community of Garland is located 15 miles from Dallas and within the Dallas-Fort Worth Urbanized area. Although Garland has a population of 138,857, it is only a fraction the size of Dallas. Its close proximity to Dallas further suggests that it may be a mere appendage of Dallas, and that *Huntington* should apply. The signal population coverage also favors applying *Huntington* to the proposal for Garland. In this regard, both proposals will project a 2 mV/m contour over Dallas both day and night. Moreover, because of Garland's location within the Dallas-Ft. Worth Urbanized Area, which is more densely populated than the SMSA, the applicants for Garland will reach significantly more people both day and night than Tuck could serve if it had specified the same daytime power as the Garland applicants propose.

63. However, with regard to the most important consideration under *Huntington* -- the relationship between the specified community and the central city -- we find that the Review Board's determination to apply *Huntington* to the Garland proposals is not supported by substantial evidence. In other words, Tuck and Bluebonnet have not met their burden of demonstrating that Garland is an integral part of a larger homogeneous metropolitan area that shares common needs and interests.

64. Although Garland is located in the Dallas-Fort Worth Urbanized Area, the record reflects that it has its own fire and police departments, its own school district with 54 public schools, its own electric and water service, two libraries, three hospitals, and two community colleges. On the other hand, the record contains only a few references to the "North Dallas area" which suggest an interdependence between Garland and the larger metropolitan area. Tr. at 434, 436. In addition, a former mayor of Plano testified that Plano and Garland are considered part of the Dallas "Metroplex" -- an informal label that we must view even more cautiously than "SMSA" or "Urbanized Area" -- and that these two communities are served by a number of umbrella organizations that also serve Dallas. Tr. at 376-79; Bluebonnet Ex. 7, Attachment B at 11. However, as discussed in paragraph 38 above, the extent to which municipal services are provided by the local community, rather than jurisdictions in the larger metropolitan area, has limited relevance in determining whether *Huntington* should apply. Thus, we find that, on balance, the weight of the present evidence does not establish Garland's interdependence with the Dallas-Fort Worth metropolitan area.

3. *The Waxahachie Proposal*

65. We also conclude that the record does not support the Board's determination to apply *Huntington* to Tuck's Waxahachie proposal. In fact, we find that Bluebonnet, Century, and Dontron have not met their burden of proof with respect to *any* of the three criteria set forth in paragraph 40 above.

66. As an initial matter, we do not share the Board's reluctance to characterize Tuck's proposal, which will serve only 50,691 persons in 672 square miles at night and will use 1 kw of power both day and night, as localized. Daytime-only station KBEC presently projects a 0.5 mV/m contour over Dallas, Fort Worth, and most of Dallas and Tarrant Counties during the day. Tuck proposes twice the daytime power presently used by its Waxahachie station, which will enable it to project a 2.0 mV/m contour over Dallas during the day. Although this constitutes primary service under 47 C.F.R. § 73.182(e), Tuck's proposal to use only 1 kw of power during the day is significantly more modest than the clearly regional proposals of the competing applicants, which will operate at 5 to 10 kw during the day. Moreover, station KBEC, unlike the proposals for Garland and Plano, will not project a 10 mV/m signal over Dallas at night. Joint Ex. 1, fig. 6. However, for the reasons set forth above, Tuck's specification of less than maximum power during the day is not relevant in determining whether *Huntington* applies.

67. With regard to the relationship between the specified community and the central city, the record contains virtually no evidence that Waxahachie is an integral part of the Dallas-Fort Worth metropolitan area. Nor is there any record evidence that the Dallas stations have made any special effort to serve Waxahachie. In fact, the record affirmatively reflects that Dallas stations do not cover local Waxahachie government and events. Tuck Ex. 5 at 1, 22. Moreover, the record provides substantial evidence establishing that Waxahachie is independent from the larger Dallas-Fort Worth metropolitan area. In this regard, Waxahachie is a self-governing community with a full complement of civic, educational, medical, and commercial facilities. It is the county seat for Ellis County, which is an important agricultural area. Ellis County does not include Dallas or Fort Worth. However, to the extent that such evidence relates to the jurisdictional scale with which local public goods are produced, it may have, for the reasons discussed in paragraph 38, only limited relevance under *Huntington*.

68. Turning to the size and proximity of the specified community to the central city, Waxahachie has a population of 14,624. It is approximately 30 miles south of Dallas, and outside the Dallas-Fort Worth Urbanized Area, but within the Dallas-Fort Worth SMSA. Although Waxahachie's location outside the Urbanized Area does not favor invoking *Huntington* against Tuck, we emphasize that we do not prejudge this third issue. The evidence on remand may show that Waxahachie is interdependent with Dallas-Fort Worth despite its location outside the Urbanized Area.

69. Finally, with respect to signal population coverage, Tuck's 2 mV/m contour will not reach Dallas at night, and its primarily local service will serve fewer people both day and night than the competing proposals. Under these circumstances, and in the absence of any other evidence that Waxahachie's presumptive need for a full-time local transmission service issue for self-expression is adequately met by the plethora of facilities licensed to surrounding com-

munities in the larger Dallas-Fort Worth metropolitan area, we conclude that Bluebonnet, Dontron, and Century have not met their burden of showing that *Huntington* should apply to the Waxahachie proposal. *New Radio*, 804 F.2d at 761. Accord, *Beaufort*, 787 F.2d at 652-53.

V. ORDERS

70. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED AND REMANDED to the presiding Administrative Law Judge for further hearings in accordance with this Memorandum Opinion and Order, and for the preparation of a supplemental initial decision on the following hearing issues:

(1) To determine the areas and populations that will receive nighttime service from station KBEC when it begins operating at 65 watts, pursuant to the Commission's show-cause order;

(2) To determine what effect the findings made under Issue 1 have on the section 307(b) issue;

(3) To determine whether *Huntington* should apply to the proposals for Waxahachie, Plano, and Garland based on the criteria set forth in paragraph 40 above;

(4) To determine, in light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service; and

(5) To determine, in the event that it is concluded that only Dontron and Century are entitled to section 307(b) preferences, which of the proposals for Garland would, on a comparative basis, better serve the public interest.

71. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under Issue 1 SHALL BE on Tuck; and that the burdens of proceeding and of proof with respect to Issue 3 SHALL BE as set forth herein.

72. IT IS FURTHER ORDERED, That the ALJ IS DIRECTED to expedite the further evidentiary hearings ordered herein.

73. IT IS FURTHER ORDERED, That the Contingent Application for Review, filed June 9, 1986, by Faye and Richard Tuck, Inc., and the Applications for Review, filed June 9, 1986, by Bluebonnet Broadcasters, Inc., Dontron, Inc., and Century Broadcasting Corporation ARE DISMISSED, and that the Review Board's Decision in this proceeding, 103 FCC 2d 936 (1986), IS MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] This case does not raise a question concerning the resolution of section 307(b) issues in television cases, and we have not considered this question. Thus, in deleting power and class of station as a criterion under *Huntington* as applied to radio, we do not here change anything that we previously said regarding our treatment of section 307(b) issues in television cases. *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1137 ¶ 14 (Rev. Bd. 1982), aff'd on other grounds, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), where we explained that television raises different section 307(b) considerations than radio because television stations typically serve much larger areas, involve greater capital investments, and require larger audiences to attract more advertising than radio stations.

[2] This is not the first time that the Commission has looked to advertising patterns in defining the parameters of a station's relevant market. For example, the Commission has looked to advertising patterns in establishing hyphenated markets for purposes of the must-carry cable television rules. Hyphenated markets are defined as markets characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different communities within the market area. *See Amendment of Section 76. 51 (Orlando-Daytona Beach, Melbourne and Cocoa, Florida)*, 102 FCC 2d 1062, 1070-71 ¶ 15 (1985); *Amendment of Section* 76.51 *(Newark, New Jersey)*, 47 FCC 2d 753, 754 ¶ 5 (1974); *Cable Television Report and Order*, 36 FCC 2d 143, 176 ¶ 87 (1972).

[3] For example, we would not necessarily find that municipalities sharing a sewage treatment plant or an air pollution control program are interdependent and share the same needs and interests for section 307(b) purposes, in the face of evidence showing that communities in metropolitan areas generally cooperate in providing such services. By the same token, the fact that a community provides its own fire protection would not be particularly probative of its independence from the larger metropolitan area if other evidence reflected that it is quite common for such communities to have separate fire departments.

[4] The applicant has considerable discretion over the technical aspects of its proposal: It can, subject to the Commission's power limitations and requirements for protection of other stations, dictate the area encompassed within its contours, and thus the number of people that its signal will reach.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Petition for Reconsideration of

DIGITAL RADIO NETWORK, INC.
Suite 120
8000 Towers Crescent Drive
Vienna, Virginia 22180

7320-04/M-2398

Licensee of radio stations
WNEH 902, WNEI 888, WNEH 274
and WNEL 508 in the Private
Operational-Fixed Microwave
Radio Service

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1988; Issued: September 8, 1988

By the Commission:

I. INTRODUCTION

1. Digital Radio Network, Inc., (DRN), has requested reconsideration of a Private Radio Bureau action of December 24, 1987,[1] which affirmed the Bureau's previous determination[2] that DRN's licenses for the above-captioned facilities had canceled automatically pursuant to Section 94.51(a) of the Commission's Rules, [3] and that DRN's request for an extension of time to construct the stations filed after the cancellation was, therefore, moot. For the reasons set forth below, DRN's petition is denied.

II. BACKGROUND

2. In the last few years, DRN has been licensed for 64 Multiple Address System (MAS) microwave radio stations throughout the United States.[4] Initially, DRN intended to provide communications for banks and their customers as part of a home banking service program.[5] Most recently, it proposes to offer a nationwide system for check and credit card verification.[6] It therefore appears that the MAS station's intended purpose has changed significantly since DRN's original proposal.

3. In the spring of 1987, four MAS stations licensed to DRN were inspected by engineers from field offices of the Commission's Field Operations Bureau as part of a routine check on the timely construction of MAS stations. The systems were located in San Diego (WNEH 902), Houston (WNEI 888), Detroit (WNEH 274) and San Francisco (WNEL 508). In each case, the inspecting engineers found that the master station had been installed, although not always plugged in or attached to an antenna. The inspecting engineers also found that the base stations did not have any remote stations and were not operational. Since the construction deadline for each of these stations had expired prior to the inspection, the Private Radio Bureau informed DRN that the licenses had canceled under Section 94.51(a) of the Rules.[7]

4. After receiving the cancellation notifications, DRN submitted a request for reconsideration. The Private Radio Bureau's letter of December 24, 1987, denied this request. In DRN's second petition for reconsideration, which we are treating as an application for review,[8] DRN requests once again that we reconsider our decision. No responsive pleadings have been filed.

III. ARGUMENT

5. DRN again claims that its licenses should not be cancelled because significant technological improvements in the design of its system resulted in its supplier being unable to provide remote radios by December 1986, as promised. Instead, the radios were not ready until July 1987. Other causes of delay, DRN maintains, were the discovery that a fully redundant back-up system was required for the system to be marketable as well as changes in management and counsel. While admitting that it underestimated the time required to implement the system, DRN claims to have expended $8 million on its 64 MAS stations through June 30, 1987. It asserts that the system, once in operation nationwide, will be highly spectrum efficient and of great benefit to the public, thus justifying the reinstatement of the four licenses and additional time for the stations to be placed in operation. In addition, DRN contends that the four systems in question are crucial to its overall system.

6. DRN does not challenge the factual basis for the Bureau's action *i.e.*, that it has not constructed the four systems. Instead, it asserts that prior Commission cases support its request, citing *Applications of IBM Research and Development, Inc.*, FCC 83-104 (released March 14, 1983); *ADT, Inc.* (July 10, 1985);[9] and *Waterway Communications System, Inc.* (August 10, 1984).[10] DRN argues that these cases, in which the applicants were given additional time to construct, involved highly innovative and technically advanced systems and that the applicants had demonstrated a good faith effort to construct, had suffered equipment delivery delays and had expended a considerable amount of money. DRN contends that its "highly innovative and technically advanced digital communications system" places it in a similar situation and that similiar relief is warranted.

7. Finally, DRN maintains that the Commission's recent amendment of the rules governing MAS frequencies in its *Report and Order* in PR Docket No. 87-5, 3 FCC Rcd 1564 (1988), further supports its request. It contends that the Commission recognized the changing nature of MAS frequency usage and the need to be flexible in resolving unpredicted usage and equipment availability problems. DRN submits that its system deserves equivalent consideration.

IV. DISCUSSION

8. Section 94.51 of the Commission's Rules provides, in pertinent part, that microwave stations must be in operation within 12 months from the date of grant or the authorization cancels automatically and must be returned to the Commission. Section 94.51 goes on to provide that requests for extensions may be granted upon a showing of good cause and that such requests must be submitted no

later than 30 days prior to the end of the 12 month period (*i.e.*, the end of the initial license term). In *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), the court observed that a radio license subject to implementation deadlines confers only contingent rights and not vested ones. The Commission, in this regard, has consistently rejected equitable arguments by SMR licensees that canceled licenses should be reinstated, particularly where the licensee has failed to request additional time prior to the expiration of the implementation period. In *P & R Temmer*, for example, the Commission specifically rejected technical difficulties with equipment as justification for reinstatement of channels canceled for failure to meet loading requirements. Similarly, in *Texas Two-Way*, 98 FCC 2d 1300 (1984), *aff' d sub nom. Texas Two - Way, Inc. v. FCC*, 762 F.2d 138 (DC Cir. 1985) (Table), the Commission found interference from a newly-constructed building and a resulting need to locate a new transmitter site to be circumstances within the licensee's control and thus no excuse for failure to meet loading requirements. In *Beryl Black d/b/a Black Electric Co.*, FCC 85-305 (June 12, 1985), *aff'd sub nom. Black v. FCC*, 788 F.2d 38 (DC Cir. 1986) (Table), the Commission rejected arguments by users of the Texas Two-Way system that automatic cancellation of channels on that system would harm them, as a basis for reinstatement.

9. We conclude that DRN has not demonstrated that its licenses should be reinstated. Its implementation problems involved precisely the kind of equipment and technical difficulties that we have held do not justify noncompliance with our construction period requirements. Moreover, DRN failed to request an extension of time to construct prior to expiration of the construction period, as required by Section 94.51(a). Its first such requests were not filed until after the stations had been inspected and DRN had been advised that the licenses had already canceled automatically. Section 94.51(a) is the mechanism by which the Commission maintains control of spectrum that is authorized for use and, thus, unavailable to others. Under this rule, in order to avoid license cancellation and reassignment of channels, licensees may seek reasonable extensions of time to place stations in operation upon good cause shown if such requests are timely made. The timely extension request provision enables the Commission to accommodate only those licensees that demonstrate good cause for a reasonable extension. Absent this requirement, and given the Commission's limited resources, the Commission could not effectively monitor licensee compliance to ensure that spectrum is, in fact, in productive use and that any implementation delays are reasonable. The timeliness provision also encourages compliance with our one year operational requirement because it places an obligation on those licensees that will not satisfy this condition to come forward and seek extensions. This provision must be strictly enforced in order to accomplish these goals.

10. The cases cited by DRN do not provide additional support for its request and are distinguishable from this case. All of the cases involved *timely* requests for extensions of time in addition to demonstrating good cause for extension.[11] On the other hand, DRN's request was filed six months after the construction deadline of the most recent grant, and it has provided no reason why it could not have filed timely requests. Additionally, we note that three of the stations (WNEH 902, WNEI 888 and WNEH 274) had already been granted extensions of time to construct. DRN failed to meet these deadlines and also failed to submit timely requests for further extensions.

11. Finally, our recent amendment of the MAS rules in PR Docket No. 87-5 does not support DRN's request. While the *Report and Order* did make the MAS rules more flexible in order to accommodate new technologies and different system designs, that was not its primary purpose. *Report and Order*, at para. 10. The central issue before us was "how best to accommodate the increasing demand for 900 MHz point-to-multipoint spectrum" and to "resolve congestion concerns." *Id.* These objectives are furthered by requiring timely construction and operation of authorized stations.

V. CONCLUSION

12. In view of the above, we are persuaded that the Bureau's initial decision should be affirmed. Neither Commission precedent nor the facts of this case provide a basis for reversal of the Bureau's decision. Accordingly, DRN's Petition for Reconsideration of the Private Radio Bureau action of December 24, 1987, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Letter from Ralph A. Haller, Chief, Private Radio Bureau to Christopher T. Rogers, Esquire.

[2] Letters dated June 24, July 8 and July 14, 1987, from Richard J. Shiben, Chief, Land Mobile and Microwave Division and W. Riley Hollingsworth, Chief, Compliance Branch, Land Mobile and Microwave Division to Digital Radio Network, Inc.

[3] 47 C.F.R. § 94.51(a). The rule provides that microwave stations must be placed in operation within 12 months of the date of grant "or the authorization cancels automatically. . . ."

[4] A Multiple Address System is a one-way or two-way microwave radio system which normally operates from a fixed or mobile master station transmitting to or receiving from multiple (four or more) fixed remote stations. 47 C.F.R. § 94.3.

[5] DRN Progress Report, July 20, 1987.

[6] *Id.*

[7] The construction deadline for WNEH 902 was November 26, 1986; for WNEL 508, December 13, 1986; for WNEI 888, December 21, 1986; and for WNEH 274, February 16, 1987. Our decision here involves only these stations. It has no effect on DRN's 60 remaining MAS stations.

[8] The Bureau referred DRN's second petition for reconsideration to us to facilitate our review of the policy issues raised herein concurrently with similar implementation issues raised in a companion case, Associated Information Services Corporation.

[9] Letter from Robert S. Foosaner, Chief, Private Radio Bureau to Jeremiah Courtney, Esquire.

[10] Letter from Robert S. Foosaner, Chief, Private Radio Bureau to Martin W. Bercovici, Esquire.

[11] In *ADT*, the extension request was timely for some of the stations under the provisions of 94.51(a), but was not timely for others. The Bureau granted the extension request for all stations, however, because construction had been delayed pending consideration of ADT's request for clarification concerning whether its proposed system design was in accordance with the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JACKSONVILLE CELLULAR TELEPHONE CORPORATION — File No. 83000-CL-P-258-A-86

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Jacksonville, North Carolina Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1988; Released: September 8, 1988

By the Commission:

1. In a Memorandum Opinion and Order, 2 FCC Rcd 6416 (Mob.Serv. Div. 1987) (*MSD Order*), the Common Carrier Bureau's Mobile Services Division granted the application of Jacksonville Cellular Telephone Corporation (JCTC)[1] for authority to construct and operate the non-wireline cellular radio system for the Jacksonville, North Carolina Metropolitan Statistical Area (MSA) and denied two petitions to deny that application. One of those petitioners, George C. Covington, who ranked second in the non-wireline lottery, has filed an application for review of the *MSD Order*. JCTC has filed an opposition to Covington's pleading and Covington has filed a reply to JCTC's opposition. For reasons discussed below, we affirm the *MSD Order*.

2. Covington argues that JCTC's application should have been dismissed pursuant to the Commission's "letter perfect" standard because the applicant failed to comply with our cellular application rules in two specific respects. Covington's arguments are actually directed against Charles E. Fitzgerald, who was the original applicant and won the non-wireline lottery for the Jacksonville, North Carolina MSA. Mr. Fitzgerald later substituted JCTC as the tentative selectee. Covington claims that JCTC's application should have been dismissed because Fitzgerald failed (1) to provide information specifically required by Item 18 of the application form (FCC Form 401) and (2) to include the required separate exhibit providing information on the frequency plan to be used if his application were granted.

3. With regard to Covington's first claim, Item 18 of the application form (FCC Form 401) literally requires an applicant to disclose all of its ownership interests in applications and licenses for Part 22 radio stations within 40 miles of the station for which the applicant has applied. The main purpose for Item 18 is to permit the Commission to evaluate an applicant's Public Land Mobile Service (PLMS) licenses and applications and to ensure compliance with the Commission's objective loading standards for conventional two-way mobile stations. To a large extent, Item 18 is a restatement of Section 22.15(i)(2) of our Rules, which is specifically addressed to PLMS applicants as opposed to cellular radio applicants. Item 18 has relevance to cellular radio applicants in markets above the top 120 markets only to the extent that such an applicant has ownership interests in more than one application for the same market. Thus, Section 22.921 of our Rules prohibits a party to a cellular application from having an ownership interest in more than one application for the same market; however, interests of less than one percent are not considered.

4. As the *MSD Order* stated, Fitzgerald should have listed his cellular application for the Wilmington, North Carolina MSA in his initial Jacksonville application in order to comply with the directives of Item 18. Although Fitzgerald failed to make the required listing in his initial application, he did reveal his Wilmington application in a subsequent amendment to his Jacksonville application. The *MSD Order* concluded that Fitzgerald's failure to reveal the Wilmington application at the time he filed his Jacksonville application had no decisional significance. In this regard, the *MSD Order* noted that Item 18 is relevant to cellular licensing "only to the extent that an applicant has an interest in another station or application in the same market as the one for which it applies in the instant application," citing its previous order in *Bloomington - Normal MSA Limited Partnership*, 2 FCC Rcd 5427, 5429 (Mob.Serv.Div. 1987). Thus, because Wilmington and Jacksonville are not in the same market, the *MSD Order* concluded that Fitzgerald's Wilmington application was not relevant to its determinations in this case.

5. We concur with the foregoing conclusions of the *MSD Order*.[2] In addition, we affirm the Common Carrier Bureau's explanation in *Johnstown Cellular Communications Co. (Johnstown)*, 1 FCC Rcd 1164 (Com.Car.Bur. 1986), that our "letter perfect" standard applies only to certain specified pre-lottery filing requirements: *i.e.*, each applicant for cellular markets 121 and beyond was required to certify to the completeness of its application, submit an original application and paper duplicate, the cover of which had to include the applicant's name and the market name, market number and frequency block for which it was applying, and provide two microfiche copies of its application at the time of filing. *See* our *Further Reconsideration Order*, 59 Rad. Reg. (P&F) 2d 407, 410 at n.16. Thus, the "letter perfect" standard does not apply to either of the two alleged defects which Covington discusses in his application for review. Moreover, to the extent that the original application arguably failed to comply with our Rules and application requirements, those shortcomings did not render JCTC's application unacceptable for filing and were corrected by subsequent minor amendments, as permitted by Section 22.918(b) of our Rules.

6. With regard to Covington's second claim, the *MSD Order* observes that Section 22.913(a)(6) of our Rules states that a cellular radio applicant should submit a separate exhibit indicating the frequency plan to be used if the application is granted, while Section 22.913(a)(3) of our Rules states that such an applicant should submit a separate exhibit for the engineering data and calculations used to derive the applicant's service contours. Although Fitzgerald combined the data required by the foregoing rule

subsections into one exhibit, the *MSD Order* concluded that this procedural defect did not render his application unacceptable for filing. In this instance, all the substantive information that was needed to process the application was clearly provided. Therefore, we concur with the foregoing conclusion in the *MSD Order*.

7. The *MSD Order* also noted that Fitzgerald failed to provide sufficient information in his initial application to identify fully his frequency plan, but that he filed an amendment which supplied the missing information. Specifically, for each of his three proposed cells, Fitzgerald's initial application identified the number of channels to be used and their channel numbers as well as their channel group in the Motorola four-cell reuse plan, which is a standard frequency allocation plan used throughout the cellular industry. Thus, on the surface, it would appear that Fitzgerald had provided more information than required by the Commission's January 21, 1986, *Public Notice* entitled "Filing Information for Cellular Markets 121-305." Page 4 of the referenced *Public Notice* contained the following question and answer:

> Q. Must applicants provide a frequency plan that shows specific frequencies for each site?
>
> A. No. The applicant must, however, provide the number of frequencies to be used at each site and list either the specific frequencies or the groups from which the frequencies will be selected. Similarly, applicants need not list specific frequencies in response to Item 33(j).

Even though Fitzgerald stated the number of frequencies to be used at each site and listed specific channels for each cell site, he listed "channels" as defined by the Motorola plan he was utilizing (*e.g.*, channel 312) and those channels had a different numbering convention from the frequencies listed in our Rules for use by cellular licensees (*e.g.*, 870.30 MHz). The Motorola plan and the relevant formula for converting channel numbers to FCC frequency numbers were known by various engineers who were familiar with and provided services for the cellular industry. Nevertheless, our processing staff determined that applicants which listed channels that were numbered differently from the frequencies listed in our Rules should clarify their frequency plan by including the relevant formula for converting those channel numbers to FCC frequency numbers. In this light, Fitzgerald submitted a minor clarifying amendment which set forth the relevant formula for converting channel numbers to FCC frequency numbers as well as the entire Motorola frequency allocation plan.

8. The *MSD Order* concluded that Fitzgerald's initial failure to submit all the information needed to explain fully his frequency plan was not fatal. The *MSD Order* noted that, due to the widespread confusion about what information was required for frequency plans in cellular applications for markets 121-305, the Common Carrier Bureau had allowed cellular applicants to amend their applications to provide similar data not contained in their initial frequency plans. *See, e.g., Richard Bawab*, 2 FCC Rcd 4159 (Mob.Serv.Div. 1987). We concur with the conclusion of the *MSD Order* on the foregoing matter. Our January 1986 *Public Notice*, *supra*, was issued to clarify the requirements of Section 22.913(a)(6) of our Rules concerning what data should be submitted to identify an applicant's frequency plan. The reinstatement of the application in *Richard Bawab* was based on a Mobile Services Division determination that the *Public Notice* was ambiguous regarding frequency plan information required to be filed in cellular applications. It appears from the evidence of record that Fitzgerald relied upon the *Public Notice*. Fitzgerald's application was filed after the release of the *Public Notice* and prior to the *Bawab* decision. The applicant's pleadings in this proceeding indicate that it was attempting to conform its application to the guidelines concerning frequency plans set forth in the *Public Notice*. In light of these circumstances, we conclude that the Mobile Services Division was correct in allowing Fitzgerald to amend his application with respect to the minor deficiency in his frequency plan.

9. In conclusion, the applicant's initial application did not have any defects which were fatal under our "letter perfect" standard. Moreover, to the extent that the original application did not comply with our application requirements, those shortcomings did not render JCTC's application unacceptable for filing and were corrected by subsequent minor amendments, as allowed by Section 22.918(b) of our Rules. Lastly, we find that JCTC has provided all the information necessary to evaluate its application and that the MSD correctly concluded that JCTC is fully qualified to be a Commission licensee.

10. Therefore, for the foregoing reasons, IT IS ORDERED that the application for review filed by George C. Covington IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] In December 1987, the Commission approved the pro forma assignment of JCTC's construction permit from JCTC to Jacksonville Cellular Communications, Inc. The assignment was consummated on January 11, 1988, after the pleadings herein had been filed.

[2] Covington argues that the Bureau exceeded the scope of its delegated authority when it explained the "letter perfect" standard in *Johnstown*. In light of our decision herein, Covington's argument concerning the extent of the Bureau's delegated authority has been rendered moot. In any event, we conclude that the Bureau had authority to interpret the "letter perfect" standard and resolve the case before it based on the Commission order adopting that standard. *See* Section 0.291(a)(2) of our Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
Tariff F.C.C. No. 1

Transmittal No. 1275

ORDER

Adopted: August 26, 1988; Released: August 29, 1988

By the Chief, Common Carrier Bureau:

1. On July 1, 1988, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1275 which proposes, among other things, to redistribute the calling hours applicable to its standard, discount, and economy rates to Israel. Several AT&T customers have filed letters with the Commission opposing the proposed tariff revisions.[1] AT&T submitted its response to those letters on August 8. The tariff is scheduled to take effect on August 30, 1988.

2. Transmittal 1275 purports to redefine the calling hours of Message Telecommunications Service (MTS) from the United States to Israel in an effort to align more closely AT&T's standard rates with peak traffic volumes. AT&T Description and Justification (D&J) at 3, 6. The tariff, which does not alter the rates currently in effect for service to Israel, proposes to extend the current standard rate period by two hours, reduce the current discount rate period by three hours, and change the current economy rate period from 3 P.M. - 9 P.M. (EST) to 5 P.M. - 12 midnight. *Id.* at 7.

3. AT&T further proposes to extend its "Reach Out" program to Israel. Under that program, it would charge $0.85 per minute during the economy period, $1.05 per minute during the discount rate period and, on weekends only, $1.20 per minute during the standard rate period. *Id.* at 11. Reach Out Israel would also entail a nonrecurring service order charge of $10.00, waived for the first 90 days the new service is offered in a particular billing area, as well as a monthly recurring charge of $5.00. *Id.*

4. Petitioners contend that AT&T's redistribution of calling hours is tantamount to a rate increase, especially in light of the 7-hour time difference between the United States (EST) and Israel. They observe that the economy rates will be effective from 12 midnight to 7 A.M. Israeli time, when most people are asleep or preparing to leave for work. Petitioners additionally note that the least expensive hours for Reach Out Israel coincide with the new economy hours (5 P.M. - 12 midnight EST, 12 midnight - 7 A.M. Israeli time). They calculate that calls over 15 minutes in length will be more expensive under Reach Out Israel than under the economy rate.

5. In response, AT&T contends that its plan is designed to produce a distribution of traffic which, over time, will reduce network congestion, improve call-completion ability, and lower requirements for additional circuit capacity during peak calling periods. Letter from Douglas S. Wilcox, Division Manager, AT&T, to Acting Secretary, Federal Communications Commission, Aug. 8, 1988, at 1. AT&T submits that its review of the traffic patterns to Israel revealed that two hours of its current economy period coincide with an Israeli domestic peak traffic period. Because of such overlap, AT&T notes, the Israel Telecommunications Corporation supports the proposed new hours. *Id.* at Attachment A (letter from Israel Telecommunications Corporation to AT&T).

6. AT&T further maintains that Reach Out Israel is a valuable additional option for its customers. It submits that the plan was designed for the majority of its customers based upon an evaluation of usage data. Prior to accepting a customer's subscription to Reach Out Israel, AT&T states that it plans to explain that the advantages of the plan for a given user will depend upon the number of calls that customer makes to Israel, as well as the times of day and durations of those calls. *Id.* at 2. In addition, AT&T asserts that all calls made under the program will be specifically identified on the customer's bill, and the customer will be sufficiently informed to compare its Reach Out Israel charges with charges he or she would pay without the plan. *Id.*

7. The Common Carrier Bureau has reviewed the tariff transmittal, the Description and Justification supporting it, and the pleadings. We find that no compelling argument has been presented that the tariff revisions filed by AT&T are patently unlawful so as to require rejection. Nor do the revisions warrant investigation at this time.

8. IT IS THEREFORE ORDERED that the petitions to reject American Telephone and Telegraph Company Tariff F.C.C. No. 1, Transmittal No. 1275, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] For purposes of this Order, these letters will be treated as petitions to reject Transmittal 1275.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE COMPANY Tariff F.C.C. No. 41 — Transmittal No. 909

ORDER

Adopted: August 26, 1988; Released: August 26, 1988

By the Chief, Common Carrier Bureau:

1. On June 15, 1988, New York Telephone Company (NYT) filed Transmittal No. 909, which provides for the introduction of 45 megabit per second (Mbps) to 1.544 Mbps multiplexing (DS3/DS1 multiplexing) as an optional feature of its Superpath Optical 45 Mbps service. NYT has proposed this function to permit up to 28 1.544 Mbps (DS1) channels to be derived from one 45 Mbps (DS3) channel. On June 30, 1988, Teleport Communications-New York (Teleport) and US Sprint Communications Company (Sprint) filed petitions to reject or suspend and investigate Transmittal 909, to which NYT replied on July 11.[1] The tariff is scheduled to take effect on August 29, 1988.

2. NYT's current tariffed access services allow 24 voice grade (DS0) signals to be combined into one DS1 signal. The proposed DS3/DS1 multiplexing service would permit 28 DS1 channels to be combined into one DS3 channel, and would only apply to those DS1 channels that terminate within the local servicing area of the "terminus hub." NYT Description and Justification (D&J) at 1.[2] NYT further proposes to allow shared use, whereby the customer may request that its switched trunks be assigned to the 45 Mbps multiplexed special access facility. *Id.* For proper allocation of charges associated with a shared system, NYT submits that the 45 Mbps channel termination and channel mileage charges be proportionately reduced according to the number of switched trunks traveling the system. *Id.* NYT proposes to offer DS3/DS1 multiplexing as an optional feature of the existing 45 Mbps service on an individual case basis (ICB). *Id.* at 2.

3. In light of the pending ICB proceeding,[3] Teleport argues that NYT should have offered some justification for using ICB rates for a DS3-related offering, and asks the Bureau to incorporate this offering into the ICB investigation. Teleport Petition at 2. Teleport asserts that NYT has not stated how the proposed DS3/DS1 multiplexer could differ from installation to installation. *Id.* at 3. Noting that NYT tariffs its other optional multiplexer features on an averaged basis, Teleport submits that pricing this arrangement as an ICB could lead to unreasonable rate discrimination. *Id. at 3-4. Teleport further argues that by tariffing the proposed arrangement as an option, NYT purports to bundle its availability with the purchase of DS3 service from NYT. Id.* at 4. Thus, Teleport contends, NYT will deny customers the opportunity to receive DS3/DS1 multiplexing from NYT but use a DS3 channel provided by another carrier. *Id.* at 5.

4. Sprint objects to NYT's limiting the location of the proposed multiplexing arrangements to terminus hubs. Sprint assumes that the terminus hub would generally be located at a NYT class 5 end office and therefore that the DS3 facility would have to originate or terminate at that end office. Sprint Petition at 2. As a result, Sprint contends, NYT could not gather traffic from neighboring end offices to be placed on a certain DS3 facility. *Id.* at 3. In addition, due to NYT's proposed reduction of the channel mileage and channel termination charges in a shared use situation, Sprint contends that interexchange carriers placing the most switched traffic over a DS3 facility will pay the lowest monthly charges for that facility. *Id.* Sprint thus concludes that only AT&T has enough traffic to justify the use of a DS3 facility between its POP and a terminus hub. *Id.*

5. In response to Teleport's contention that ICB pricing of its proposed arrangement is unlawful, NYT argues that its proposal discourages "certain harmful pricing practices by alternative suppliers . . . that would undermine the competitive marketplace for DS3 services." NYT Reply at 2. Moreover, NYT contends that the costs of this service will differ from installation to installation as a result of rapidly changing technology, the use of several vendors, and the availability of multiple design configurations. *Id.* at 3-4. NYT additionally submits that other companies use ICB pricing for this optional feature. *Id.* at 4. In response to Teleport's "bundling" argument, NYT asserts that DS3 transmission and DS3/DS1 multiplexing will not be bundled on an "all or nothing" basis in that the customer will be free to take DS3 service with or without DS3/DS1 multiplexing. *Id.*

6. NYT answers Sprint by conceding that while its proposal will benefit large volume access customers, such favoritism is not a result of the terminus hub requirement. *Id.* at 5. NYT argues that the terminus hub requirement applies equally to all customers and notes that removal of the provision might save AT&T money due to the extent of its network. *Id.* NYT further asserts that shared use is necessary to avoid overrecovery of the cost of providing the DS3 service. *Id.* In addition, NYT contends that the terminus hub requirement will encourage efficient use of its interoffice network and discourage expensive network redesigns. *Id.* at 6. It asserts that if the terminus hub requirement were removed, interexchange carriers could seek to redesign their access facilities to take advantage of pricing differences, "regardless of whether the net result is a more efficient overall network or lower costs." *Id.*

7. The Common Carrier Bureau has reviewed the tariff transmittal, the Description and Justification supporting it, and the pleadings. We find that no compelling argument has been presented that the tariff revisions filed by New York Telephone are patently unlawful so as to require rejection. Nor do the revisions warrant investigation at this time as NYT has not yet proposed actual ICB rates. Because NYT's plan proposes to treat a DS3-equivalent service on an individual case basis, any ICB rates later proposed by NYT will be included in the ICB investigation when filed.[4]

8. IT IS THEREFORE ORDERED that the petitions filed against New York Telephone Tariff F.C.C. No. 41, Transmittal No. 909, by Teleport Communications-New York and US Sprint Communications Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

FOOTNOTES

[1] On July 19, WTG-Central, Inc., and WTG-West, Inc. (WTG) filed informal comments in support of the Teleport and Sprint petitions.

[2] NYT defines "terminus hub" as "a wire center in which a DS3 facility can be multiplexed (DS3 to DS1) or a DS1 facility can be multiplexed (DS1 to Voice), and from which individual channels are terminated at customer designated premises located within the local serving area of that wire center or further multiplexed within the Terminus Hub." Transmittal No. 909 at 5th Revised Page 101, Section 2.6.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 3 FCC Rcd 2582 (1988) (*ICB Order*).

[4] *See* ICB Order, 3 FCC Rcd at 2583 n.1 (investigation incorporates proposed ICB rates for DS3 and DS3-equivalent services).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-112

In the Matter of

Development and Implementation of
a Public Safety National Plan and
Amendment of Part 90 to Establish
Service Rules and Technical Standards
for Use of the 821-824/866-869 MHz
Bands by the Public Safety Services.

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 20, 1988; Released: September 7, 1988

By the Commission:

I. INTRODUCTION

1. On December 18, 1987, the Commission released a *Report and Order* [1] adopting policies, service rules, and technical standards to govern use of the 821-824/866-869 MHz public safety spectrum. Five petitions were filed asking reconsideration of that *Order*. One of these was a petition submitted by J. Y. Nasser, past chairman of the National Public Safety Planning Advisory Committee (NPSPAC), requesting that the Commission realign the regional boundaries of the public safety planning regions. On March 30, 1988, the Commission adopted a *Memorandum Opinion and Order* granting that request.[2]

2. Four other parties filed petitions regarding various decisions in the *Report and Order*. These petitions are the subject of this *Memorandum Opinion and Order on Reconsideration*. General Electric Mobile Communications Business (General Electric) requests that the Commission reconsider its decision in the *Report and Order* with respect to trunking standards and establish a trunking standard for equipment used in the 800 MHz public safety bands. The Cellular Telecommunications Industry Association (CTIA) requests that the Commission consider adoption of measures to ensure that transmissions from the public safety bands (821-824/866-869 MHz) do not cause interference to the adjacent cellular bands (824-849/869-894 MHz). The International Municipal Signal Association and the International Association of Fire Chiefs (IMSA/IAFC) seek reconsideration and clarification on two issues relating to the functions of the Regional Planning Committees (RPCs). [3] First, they ask that the Commission modify the *Report and Order* with regard to RPC authority to ensure that all eligible entities are afforded fair treatment in obtaining channel assignments. Second, they request that the Commission clarify the matter of RPC responsibility as to the assignment of vacated, below-800 MHz frequencies. Finally, the New Jersey Division of State Police requests that the Commission authorize and permit 806-821/851-866 MHz radio equipment to be modified to operate in the 821-824/866-869 MHz bands without requiring that such equipment be type accepted as conforming to the revised technical standards established in the *Report and Order*.

II. ISSUE ANALYSIS

A. Petition of General Electric Mobile Communications Business

Background

3. In the *Report and Order*, the Commission decided not to adopt or mandate a trunking standard for equipment manufactured for trunked operation in the 821-824/866-869 MHz public safety bands. The Commission did, however, establish five mutual aid channels and required that all equipment manufactured for use in the public safety bands have the capability of transmitting and receiving on these channels. The Commission further required that these mutual aid channels operate in a conventional mode to "provide a common interface between different types of trunked systems." *Report and Order* at para. 38.

Petition

4. General Electric's petition requests that the Commission reconsider its decision declining to establish a uniform trunking standard. General Electric argues that we should establish a trunking standard for all equipment manufactured and used in the 800 MHz public safety bands.

5. General Electric asserts that failure of the Commission to require interoperability among trunked systems will interfere with the ability of agencies using different systems to communicate effectively with one another and coordinate operations. General Electric petition at 4. It also points out that the lack of interoperability among trunking systems will lock-in public safety agencies to a single vendor, thereby preventing them from purchasing competitive equipment when expanding their systems. General Electric petition at 6.

6. General Electric indicates that under the Commission's *Report and Order* the only means for communication between agencies with incompatible trunking systems will be through the linkage of systems on the five common mutual aid channels. General Electric points out that this type of communication may require manual dispatcher intervention which denies the flexible operation and conservation of spectrum that trunking is intended to promote. General Electric petition at 5. It emphasizes further that because, according to the NPSPAC Final Report,[4] the five mutual aid channels are restricted to disaster management and other emergency situations, intersystem communication using these channels in non-emergency situations would effectively be prohibited. General Electric petition at 5.

7. In offering additional support for trunking standardization, General Electric states that because of the different proprietary signalling protocols for trunked systems on the market today, voice-encrypted communication between these systems will not be possible. Thus, according to General Electric, cross-system communications, even where feasible, would be of little use in situations requiring secrecy. General Electric petition at 5.

8. General Electric's second major concern is that because protocols for trunked systems are proprietary, users will be locked-in to original vendors indefinitely. General Electric petition at 6. This would, according to General Electric, force agencies currently using a particular manufacturer's radio units to purchase that company's trunking system irrespective of their preferences with respect to such equipment, since their mobile units will operate only with that manufacturer's trunking equipment. General Electric petition at 7. General Electric points out, conversely, that for the same compatibility reasons, agencies utilizing a particular company's trunking system must also acquire that manufacturer's radio units.

9. An extension of this problem, according to General Electric, is that all public safety entities that have a need to communicate with a given agency using a particular manufacturer's trunking system will have to utilize equipment from that manufacturer. This, in General Electric's words, would mean that "an entire region would be denied the benefits of acquiring radio and trunked products from competing manufacturers." In addition, General Electric expresses the fear that a manufacturer that has "locked up" a particular agency or agencies would have little incentive to improve its equipment or reduce the cost of such equipment, and that in these times of limited budgets, an agency would not be likely to replace its existing system with one of a different manufacturer even if the equipment of that manufacturer was superior to the equipment currently in use. General Electric petition at 8.

10. General Electric's solution to these problems is to recommend the development of a trunking standard by either NPSPAC or some other existing entity. If no consensus can be reached among the manufacturers and the user community, General Electric proposes that the Commission should step in and prescribe standards. General Electric petition at 10.

Oppositions to the General Electric Petition

11. Motorola opposes General Electric's petition. Specifically, Motorola disputes General Electric's contention that interoperability among various entities would be limited to the five mutual aid channels. Motorola points out that the FCC's action adopting the five mutual aid channels merely "establishes a floor" and does not preclude regions from designating more of these channels if they deem more channels to be necessary to satisfy local conditions. Motorola comments at 6. With respect to the use of these mutual aid channels to link incompatible sytems, Motorola maintains that the level of complexity described by General Electric for such networking schemes is not necessary or required. Motorola contends instead, that effective communications could be established that would allow for automatic networking without dispatch intervention, and provides the example of an existing system in the city of Miami that currently uses such a networking approach to link incompatible trunked systems. Motorola comments at 8. As for General Electric's call for a standard trunking protocol, Motorola fears that such action would negate the opportunity for interoperability between existing 806-821/851-866 MHz public safety systems and those to be implemented in the new 821-824/866-869 MHz bands. Motorola comments at 7.

12. Motorola concludes that acceptance of General Electric's recommendation would have numerous harmful effects. First, the proposal, in Motorola's opinion, would delay the utilization of the new public safety band indefinitely; second, it would cause entities that have already purchased or installed 800 MHz systems to be "suddenly in jeopardy"; third, it would cause entities that have appropriated money for 821-824/866-869 MHz systems to be "in limbo"; and finally, it could result in agencies "pidgeon-hol[ing] plans" while waiting for a standard to be adopted. Motorola comments at 11. Motorola states, in conclusion, that there is an immediate need for essential public safety systems in many areas and that, due to this urgent requirement, no delay in the planning process resulting from the development of a trunking standard is "warranted" or should be "countenanced." Motorola comments at 12.

13. A number of parties oppose the General Electric petition because of the delays that might result in the assignment of the new public safety frequencies if licensing were delayed pending development of standards. Specifically, The Port Authority of New York and New Jersey states that "no justification can now be offered for further delaying the licensing of this urgently needed spectrum." Port Authority comments at 5. The Suffolk County Police Department argues that the trunking standard sought by General Electric "would surely delay the assignment of frequencies for an unknown, unreasonable time." Suffolk County comments at 3. The County of Los Angeles, California submitted late-filed comments stating that "the prompt availability of the 821-824/866-869 MHz frequencies is crucial to public safety organizations in the Los Angeles and Southern California areas as well as in other large metropolitan areas of the country" and that any "interruptions or delays of any type in moving forward with the preparation, adoption and implementation of the Regional and National plans and subsequent license authorizations [would be], in [the County's] view, unwarranted." County of Los Angeles at 2. The North Central Texas Council of Governments' Public Safety Communications Advisory Committee (NCTPSCAC) expresses a similar point in its late-filed comments. NCTPSCAC suggests that "considering the immediate need for spectrum by public safety users in many areas of the country, and considering the time required to develop adequate trunking standards for public safety radio . . . " the Commission should "consider the issue of the development of trunking standards in a separate rule making process so as not to delay the licensing of urgently needed spectrum in the 821-824/866-869 MHz bands." NCTPSCAC comments at 1.

14. The Associated Public-Safety Communications Officers, Inc. (APCO), in discussing the mandating of standards, states that "the decision as to which manufacturer's equipment will be used with trunked systems is not a decision to be reached by NPSPAC or the Commission," but is "best left to public safety individuals upon input from manufacturers." APCO comments at 2. APCO also states, in its comments in response to late-filed statements supporting the General Electric petition, that given the pressing need for frequency assignments in the 821-824/866-869 MHz bands, "the public safety agencies would be unfairly served by being forced to wait until . . . another hurdle is overcome before new communications systems can be implemented." APCO comments on late-filed statements supporting limited reconsideration at 2 and 3.

Replies to Oppositions

15. In response to Motorola's opposition, General Electric contends that Motorola's arguments do not outweigh the need for system interoperability. System interoperability, it argues, "not only permits the highest possible degree of coordination among public safety agencies, but also [ensures] . . . a broad choice of available radio equipment in a competitive market." General Electric reply comments at 3.

16. On Motorola's claim that the five mutual aid channels are "only a floor" and that communities could, in their regional plan development, establish additional mutual aid channels, General Electric points out that the number of channels that are available for this purpose is not "infinite." It further points out that regardless of the number of mutual aid channels in use, encrypted messages can not be transmitted on these channels. General Electric reply comments at 4.

17. General Electric points to the Commission's adoption of the cellular standard and indicates that the success of cellular radio is attributable, at least in part, to the adoption of this standard. It further argues that as a result of mandating the standard, cellular telephones can be used anywhere in the country, and that many manufacturers now compete intensively for business in this market. General Electric reply comments at 6. General Electric contends that the same situation would result in 800 MHz public safety radio if a trunking standard were to be adopted.

18. General Electric recognizes that there would be a short-term cost associated with mandating a standard due to its effect upon existing 806-821/851-866 MHz trunked systems. It argues, however, that, on balance, the long-term benefits of interoperability and competitive procurement that would be realized by users of the 240 new channels far outweigh the cost of protecting the embedded technology used on the existing 70 public safety channels. General Electric reply comments at 7. It further points out that any impact on the public caused by mandating a trunking standard could be mitigated if the manufacturers of embedded equipment would unlock their proprietary technology. This, in General Electric's opinion, would avoid disruption to users of existing trunked systems. General Electric reply comments at 7.

19. Finally, General Electric, in disputing Motorola's claim that developing a trunking standard would delay utilization of the new channels indefinitely, asserts that adoption of a standard could proceed without affecting implementation of the new allocations because of the time associated with developing plans, coordinating plans with neighboring regions, and obtaining Commission approval. They say, in conclusion, that "given the indisputable benefits of a trunking standard . . . any time necessary to develop such a standard would be fully well-spent." General Electric reply comments at 8.

20. The International Municipal Signal Association (IMSA) and the International Association of Fire Chiefs, Inc. (IAFC) replied to the Port Authority opposition, expressing support for General Electric's petition. IMSA/IAFC states that implementation of trunking standards need not cause delay in the assignment of public safety frequencies. They suggest that a separate and expedited proceeding could be initiated without hampering the timely allocation of the new spectrum. IMSA/IAFC joint reply comments at 8.

21. Coded Communications Corporation (Coded) also submitted reply comments supporting General Electric's petition. Coded argues that a trunking standard would encourage competitive and open bidding, would reduce equipment costs to end users and the beneficiaries (the public) of public safety services, would foster innovation and creativity, and would provide for inter-agency communications via trunking technology. Coded reply comments at 1.

22. Following the closing date for filing reply comments, however, the Commission received a statement from the Open Architecture Radio for Public Safety (OARPS) organization.[5] This organization was established by several individuals interested in promoting trunking and voice encryption standards in public safety communications.[6]

23. OARPS, in its statement, expresses support for General Electric's petition and elaborates on many of General Electric's arguments. Specifically, OARPS proposes the creation of an organizational mechanism for developing an industry consensus on these standards, followed by the submission of this consensus as a proposed rule to the Commission. OARPS statement at 3. OARPS offers to "act as a catalyst" by soliciting proposals from trunking system vendors and requesting input from federal, state and local public safety agencies. OARPS statement at 6 and 7. They point out, further, that this procedure, by enabling the adoption of existing trunking techniques, will minimize delay in implementing the National Plan for Public Safety. OARPS statement at 8.

24. OARPS, in summarizing its position, requests that the Commission "open the issue of trunking standards for reconsideration and public comment, or, in the alternative, issue a further Notice of Proposed Rule Making on the issue of trunking standards for public safety." OARPS statement at 8.

25. Among the parties submitting late-filed statements in support of OARPS and the General Electric petition was Philips Radio Communications Systems Limited (Philips).[7] Philips provided evidence of the feasibility of the OARPS proposal to develop a national consensus on trunking standards. Philips points to its success in developing a trunking standard in England in 1984. At that time, they organized a design group consisting of the major equipment manufacturers and developed a non-proprietary standard that now enables all users and manufacturers to use open architecture signalling and standards for trunked private and public land mobile radio systems, including public safety radio systems. Philips statement at 5. This standard, according to Philips, allows systems to communicate with each other, even on channels not specifically designated for mutual aid. Philips statement at 5.

26. Craig M. Jorgensen, Director of Telecommunications for the State of Utah, in supporting an open architecture between land mobile trunked systems and speaking from the point of view of a government agency with a limited budget, states that the potential benefits of trunked technology are "far outweighed by the long term economic liability of being limited to acquiring a land mobile system from a single vendor." He further states that "the current monolithic trunk system development process significantly reduces and mitigates all potential benefits while currently driving per unit costs to a usury level." Letter from Craig Jorgensen to Chairman Patrick at 1.[8]

27. The Port Authority of New York and New Jersey submitted statement urging the Commission to reject the statements of OARPS and Philips. They argue that "it will

take an additional three years for the Commission and interested parties to develop the standards sought by General Electric, OARPS and Philips and for manufacturers to make available the equipment satisfying them." Statement of Port Authority at 3. The Port Authority concludes that the Commission should implement the National Plan and license the spectrum allocated to public safety radio, and suggests that the issues raised by General Electric and its supporters may be addressed in a future proceeding. Statement of Port Authority at 4.

Discussion/Decision

28. We believe it is appropriate to gather more information on the issue of a uniform trunking standard. We will be initiating a new Notice of Inquiry addressing specifically the issues relating to a trunking standard. We will address these issues expeditiously in the new proceeding.[9]

B. Petition of Cellular Telecommunications Industry Association

Petition and Reply Comments

29. The Cellular Telecommunications Industry Association (CTIA) submitted a petition requesting that the Commission consider adoption of measures to ensure that transmissions from the 821-824/866-869 MHz public safety bands do not cause interference to the adjacent 824-849/869-894 MHz cellular bands. In its petition, CTIA calls for the use of a guard band between the bands of the two services. In its reply comments, CTIA provides various technical arguments in support of its contention that public safety transmissions will cause interference to the cellular band, and CTIA offers several options to deal with this problem.

30. CTIA points out that while the highest public safety channel (Channel 830, at 823.9875 MHz) is situated just beneath the 824 MHz boundary, the lowest cellular channel (Channel 990), which is at 824.010 MHz, is unassigned (in accordance with Section 22.902(b)(1) of the FCC rules) due to its proximity to the band edge. CTIA reply comments at 1. Because this channel is unused, according to CTIA, it acts as a guardband on the cellular side of the 824 MHz boundary; but, CTIA claims, even with this guardband, there is still the potential for interference from the public safety transmitters operating with higher powers and greater antenna heights. It is for this reason that CTIA asserts that public safety users should bear some of the responsibility for preventing interference. CTIA reply comments at 2.

31. CTIA provides various technical arguments in support of its contention that interference will be caused to cellular receivers tuned to cellular Channel 991 (at 824.040 MHz). It contends that this interference will result from two sources. First, CTIA argues that transmissions from public safety Channel 830 would create sufficiently high fields to cause harmful interference to cellular communications through the desensitization of cellular receivers. Secondly, CTIA claims that noise emanating from public safety transmitters operating on public safety Channel 830 could cause interference that "could render the [Channel 991] cellular signal undetectable." Reply comments at 5.

32. CTIA requests that the Commission adopt one of four possible options. First, it proposes that the Commission not permit the use of public safety Channel 830. This action, along with the current preclusion of the use of cellular Channel 990 would, according to CTIA, provide an adequate guardband. Reply comments at 6. The second CTIA suggestion is for the Commission to limit the antenna height and power for Channel 830 to 500 feet and 100 watts, respectively.[10] The third CTIA option would be to limit the location of Channel 830 transmitter sites to more than 25 miles from the nearest cellular base station operating at Channel 991. The final alternative proposed by CTIA would be to require users of Channel 830 planning to locate within 25 miles of an existing Channel 991 site, to coordinate with the affected Channel 991 operator so that steps could be taken to limit the possibilities for interference.

Comments

33. Only one commenter, APCO, expressed an opinion on the CTIA petition. APCO agrees that adequate protection from interference must be provided to both public safety and cellular services. APCO views CTIA's request, however, as requiring that all the protection be provided from the public safety side of the dividing line. APCO concludes that the cellular services should, at the least, share equally in guarding against interference. APCO comments at 3.

Discussion/Decision

34. We have carefully examined CTIA's analysis of potential interference to cellular channel 991 from public safety channel 830. We are not convinced, from the evidence provided by CTIA, that interference to the cellular channel is likely.

35. A Channel 991 cellular mobile receiver located near a public safety base station transmitter operating on public safety Channel 830 might suffer some desensitization. Desensitization of receivers, however, is not an uncommon condition and can occur on any band when mobile units roam into high field areas of adjacent channel transmitters. CTIA has not demonstrated that the desensitization would be of such level or duration as to warrant the remedial action requested. We, therefore, can not agree to adopt any of the CTIA proposed options based on the argument of receiver desensitization.

36. Regarding noise from public safety base station transmitters causing interference to cellular Channel 991 mobile receivers, the limitations on public safety transmitter emissions should be sufficient to prevent interference to the cellular receivers. In our *Report and Order* establishing standards for use of the 821-824/866-869 MHz spectrum, we adopted the use of 25 kHz offset channels[11] and modified our rules on transmitter emissions in order to reduce the possibility of interference to adjacent channels. In so doing, we tightened the occupied bandwidth characteristics of the transmitted signals (versus the bandwidth characteristics of other 800 MHz transmissions) by reducing the maximum authorized frequency deviation in the new public safety bands from 5 kHz to 4 kHz.[12] Even taking into consideration the lower power levels of cellular signals, we are confident that our modified rules sufficiently limit public safety signal levels to protect against interference to cellular mobile receivers.

37. Any interference that might occur would cover a very small area adjacent to the public safety station's transmitting antenna. Further, the public safety transmitter and the cellular station on Channel 991 would have to be

on the air simultaneously. Given the needed coincidence of several conditions, widespread interference is highly unlikely. We do, however, encourage cellular operators to provide public safety regional planners with locations of service areas that might be affected. To the extent possible, regional public safety planners can avoid use of Channel 830 in those areas. If a Channel 830 public safety assignment *is* contemplated within the authorized service area of an existing cellular system, the regional planning committee should notify the licensee of the cellular system so that the parties may work together to avoid the possibility for interference to facilities operating on cellular Channel 991. If these precautionary steps are taken by cellular operators and public safety planners, the likelihood for interference to the cellular channel should be minimized. In addition, the fact that cellular Channel 990 is not assigned creates a one-channel guard band between the two services, and this provides an additional measure of protection to the cellular channel.

38. We conclude, based on the arguments, that CTIA's petition should be granted to the extent discussed above.

C. Petition of International Municipal Signal Association and the International Association of Fire Chiefs

Petition

39. The International Municipal Signal Association and the International Association of Fire Chiefs (IMSA/IAFC) have petitioned the Commission for reconsideration and clarification on two issues relating to the functions and authority of Regional Planning Committees (RPCs).

Issue 1

40. IMSA/IAFC is concerned about the Commission's direction in the *Report and Order* on the matter of eligibility and the assignment of available spectrum. Specifically, they take issue with the statement in paragraph 13 of the *Report and Order* which states that in regions where there is insufficient spectrum to meet the needs of all eligibles "the highest priority must be given to those organizations most fundamentally involved in protection of life and property." IMSA/IAFC petition at 3. IMSA/IAFC fears that, under this criterion, "eligible entities with legitimate spectrum requirements could be denied access to any additional spectrum in the event a majority of an RPC determines that the public services they render are less critical than the services provided by the majority or dominant services represented in an RPC." IMSA/IAFC petition at 5. They contend that, under these circumstances, a situation could arise that would be counter to the Commission's stated position on this issue, which is that RPC procedures "ensure that all entities will be treated fairly in the planning process." IMSA/IAFC petition at 5, and para. 48, *Report and Order*. IMSA/IAFC is concerned that eligibles in the dominant radio service or services in a region will have preferential access to the spectrum, and they therefore ask that the Commission reconsider its position in the *Report and Order* and take action to eliminate the possibility of such preferential activity. IMSA/IAFC petition at 5.

Opposition Comments

41. APCO maintains that the Commission's decision to give regional planning committees authority to establish priorities in assigning limited spectrum to those services "most fundamentally involved in protection of life and property" (para. 13, *Report and Order)* is in keeping with the Congressional direction on this matter. It points to language used by Congress in the Communications Amendments Act of 1982 in which the Congress expressed concern about "radio services which are necessary for the safety of life and property . . ., " and APCO urges the Commission to carefully consider the legitimate needs of public safety agencies in spectrum allocation decisions. APCO comments at 4. APCO further states that in the absence of an alternative proposal, the criterion established by the Commission (in para. 13 of the *Report and Order)* to satisfy the spectrum needs of all public safety services is the most logical and consistent with the Congressional directive. APCO comments at 5.

42. In the opinion of the Suffolk County Police Department, the answer to IMSA/IAFC's concern is that all services, including those in the special emergency area, can receive proper consideration in the allocation of spectrum by having proper representation on the RPCs. Suffolk County comments at 6. In addressing the Commission's direction in the *Report and Order* on establishing priorities for the limited spectrum, The Port Authority of New York and New Jersey contends that a greater degree of subjectivity would result where there are no standards to guide the allocation of spectrum and that the Commission standard, although general, is objective. Port Authority comments at 5. In the submission of plans, regions will be required to explain the criteria used to determine committee eligibility and thus, as Suffolk County indicates, the Commission will be in a position, through the approval of plans, to determine if all services have been fairly represented.

Discussion/Decision

43. In the *Report and Order*, we addressed the issue of committee eligibility and made clear that all public safety and special emergency services in a given region would have to be fairly represented on regional planning committees. We further indicated that in instances where there is insufficient spectrum to satisfy the needs of all eligibles, we would "leave it to the regional planning committees" to determine which entities would obtain channel assignments (*Report and Order*, para. 13). In such instances, however, we stated that we would require committees to explain the criteria they used to determine frequency assignments. Specifically, in paragraph 51 of the *Report and Order*, as part of the elements that all regional plans should include, we require "an explanation of how the requirements of all eligible entities within the region were considered to be met . . ., " and "an explanation as to how eligible entities have been prioritized in areas where not all can receive licenses . . . ." Accordingly, we will, through the detailed plan approval procedures outlined in the *Report and Order* be able to correct any attempts to deny eligible entities access to the new public safety bands.[13] In the absence of some alternative proposal by IMSA/IAFC or the other commenters, we find this to be the most viable method for assuring fairness in channel assignments.

Issue 2

44. IMSA/IAFC also asks that the Commission clarify RPC responsibility for reassignment of vacated frequencies below 800 MHz. They point to the fact that the Commission, while discussing the issue of vacated assignments in

paragraph 61 of the *Report and Order*, did not accord RPCs any responsibility in this area. IMSA/IAFC petition at 6. IMSA/IAFC is requesting that the Commission not only clarify the RPCs' responsibility but also act to ensure that no subsequent disputes arise between RPCs and the Public Safety and the Special Emergency Frequency Coordinators by declaring that "RPC responsibilities do not encompass consideration of any vacated Public Safety and Special Emergency assignments below 800 MHz." IMSA/IAFC petition at 6.

Opposition Comments

45. APCO opposes the IMSA/IAFC position on this matter, asserting that the reassignment of all vacated channels should be handled by the regional planning committees. APCO comments at 5. They, therefore, propose that the regional committees be given authority to handle reassignment of vacated public safety frequencies. APCO comments at 6.

Discussion/Decision

46. On the matter of below-800 MHz frequency assignments, we recognize that eligibles currently operating in the public safety and special emergency bands below 800 MHz may desire to vacate those frequencies in favor of the 821-824/866-869 MHz bands where more channel space is available. In the *Report and Order*, we indicated that we expected entities moving to the new 800 MHz spectrum to relinquish their lower band frequencies *(see* para. 62, *Report and Order)*. We did not, however, specifically address the role of the regional planning committees in the assignment of the below-800 MHz channels to public safety and special emergency eligibles.

47. The regional planning concept was developed as part of the National Public Safety Plan to provide a framework for the assignment of the newly allocated public safety spectrum. To the extent possible, regional planning committees should attempt to satisfy their public safety needs utilizing this spectrum. Regional plans, however, may encompass consideration of other public safety and special emergency bands when the new frequencies are insufficient to meet the needs of the region.

48. With regard to the licensing of channels recommended in the regional plans, eligibles applying for these channels must submit their applications to the appropriate frequency coordinator. The coordinator's first consideration in making assignments should be to the party identified in the regional plan. If, however, the coordinator determines that an assignment to that party would cause interference to an existing licensee, the coordinator shall inform the Commission of the potential for interference and recommend an alternative frequency for that applicant. This, of course, is consistent with current procedures followed by frequency coordinators.

D. Petition of the New Jersey Division of State Police

Petition

49. The New Jersey Division of State Police (Division) has filed a petition that takes issue with the Commission's position on the type of radio equipment that may be used in the new public safety bands. Specifically, the Division opposes the statement in footnote 21, paragraph 32, of the *Report and Order* which states that "Equipment that is type accepted for operation in the 806-821/851-866 MHz bands may not be modified to operate in the newly allocated spectrum at 821-824/866-869 MHz unless it is type accepted as conforming to the revised technical standards . . . ."

50. The Division currently has a trunked public safety communications system that operates in the 806-821/851-866 MHz public safety bands. It is concerned that the limitation stated in footnote 21 will have a severe impact on the plans of the Division to expand the number of RF channels allocated to its existing trunked system with compatible frequencies in the newly allocated 821-824/866-869 MHz bands. Division petition at 3. It further states that severe economic and operational hardship would result if major modifications to their existing equipment were to be required. Division petition at 2.

51. As evidence of this, they point to the fact that even the minor adjustment of reducing the deviation to 4 kHz would still have to be performed on over 2500 mobile units, 140 base stations and 100 control stations. Division petition at 3. Other adjustments to receivers and transmitters will be more complicated and, according to the Division, the type accepted retrofit kits that would be needed to effect these adjustments may not be available for existing equipment. Regardless, the Division adds, these kits will result in significant cost increases to large system users. Division petition at 3. The Division further indicates that new equipment meeting the new standards will not be available until the fourth quarter of 1988, and during the interim period, the Division's mobile fleet will continue to grow with equipment currently type accepted for operation at 806-821/851-866 MHz. Division petition at 4.

52. The Division acknowledges that use of its non-type accepted equipment on the new public safety bands would limit the availability of 12.5 kHz offets, but, they argue, that over time, purchases of new equipment using the enhanced design will result in all systems being fully compliant with the revised technical standards. Division petition at 5.

53. A final point raised by the Division is that while the NPSPAC Final Report indicated that "less than full compliance with National Plan [equipment] guidelines [might] be acceptable for expansion systems when justified and recommended by Regional Planning Committees," Division petition at 4, the Commission did not endorse this position. It is the Division's opinion that the regional committees will be amenable to permitting entities to expand into the new spectrum with equipment that is not in full compliance with the revised technical standards. The Division, therefore, requests that 806-821/851-866 MHz equipment not in full compliance with the standards be permitted for use in the 821-824/866-869 MHz bands. Division petition at 4.

54. Only one commenter expressed an opinion on the Division's petition. APCO, in generally supporting the petition, recommended that concerns such as those expressed by the Division should be addressed through the regional planning process or by individual licensee action. APCO comments at 4. It also argued that the resolution of individual cases such as those brought forth by the Division should not delay final resolution of the national plan proceeding. APCO comments at 5.

Discussion/Decision

55. In the *Report and Order*, the Commission fully addressed the issue of technical standards for new equipment manufactured in the 821-824/866-869 MHz bands and ultimately adopted the transmitter standards recommended by NPSPAC in the Final Report. We did not, however, provide guidance on modification of existing 806-821/851-866 MHz equipment for use in the new public safety bands. The petition of the New Jersey Division of State Police has made us aware that this issue is important to many state and local agencies that are currently using or are planning to purchase 806-821/851-866 MHz equipment. While we expect that many entities will be purchasing the type accepted 821-824/866-869 MHz equipment once their local plans have been developed and approved by the Commission, we recognize that a number of these entities have already expended considerable funds on 806-821/851-866 MHz systems and, therefore, will not have the option of buying the new equipment. For these agencies, the only recourse for expansion into the new bands will be through modification of their existing equipment. In order to accommodate these agencies, we provide the following option.

56. Agencies that are currently using 806-821/851-866 MHz equipment and intend to modify this equipment to operate on 821-824/866-869 MHz frequencies (without modifying the equipment to fully conform with the standards outlined in the *Report and Order)* will be permitted to do so with one important restriction. These agencies must notify their regional planning committees, and the committees should take steps, through the frequency coordination process, to try to ensure that use of this equipment does not cause interference to users operating on adjacent channels.

57. On balance, we believe the relief requested by the Division deserves favorable consideration. We turn, however, to the NPSPAC Final Report for guidance on conditions for such relief. NPSPAC recommended grandfathering of existing equipment if the modulation deviation is reduced to 4 kHz. The Report states, "Unlike the other recommended enhancements, such a reduction in deviation could be made by a simple field adjustment to the transmitters." Report at page 19. We believe this is a reasonable approach as it will allow the equipment to be used in the new band without significant impact on frequency use by others who employ the new equipment. Accordingly, existing 806-821/851-866 MHz equipment in agency possession or on order as of the date of release of this *Memorandum Opinion and Order on Reconsideration* may be used in the 821-824/866-869 MHz bands with notification to the appropriate Regional Planning Committee and with the frequency deviation reduced to +/-4 kHz. Given that each radio will already require modification to operate in the new bands, we find that the incidental modulation adjustments should not be burdensome.

III. CONCLUSION

58. IT IS THEREFORE ORDERED under the authority granted in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 4(i) and 303, that the Petition for Reconsideration filed by General Electric Mobile Communications Business is GRANTED to the extent indicated herein and otherwise is DENIED.

59. IT IS FURTHER ORDERED that the Petition for Clarification filed by the Cellular Telecommunications Industry Association is GRANTED to the extent indicated herein and otherwise is DENIED.

60. IT IS FURTHER ORDERED that the Petition for Reconsideration and Clarification filed by the International Municipal Signal Association and the International Association of Fire Chiefs is GRANTED to the extent indicated herein and otherwise is DENIED.

61. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the New Jersey Division of State Police is GRANTED to the extent indicated herein and otherwise is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

LIST OF COMMENTERS

Opposition Comments

Associated Public Safety Communications Officers, Inc.
Motorola, Inc.
Port Authority of New York and New Jersey
Suffolk County Police Department

Reply Comments

Cellular Telecommunications Industry Association
General Electric Mobile Communications Business
International Municipal Signal Association and International
Association of Fire Chiefs

Other Comments

Associated Public Safety Communications
Officers, Inc.
Coded Communications Corporation
General Electric Mobile Communications Business
Global-Wulfsberg Systems
City of Greensboro, North Carolina
Craig M. Jorgensen (State of Utah)
County of Los Angeles, California
National Association of State Emergency Medical Services Directors
North Central Texas Public Safety Communications Advisory Committee
Open Architecture Radio for Public Safety
Pacific Chapter of APCO
Don W. Pfohl (City of Mesa, Arizona)
Philips Radio Communications Systems Limited
Port Authority of New York and New Jersey
Repco, Inc.

Robert Tolman (State of Colorado)

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] Memorandum Opinion and Order, Gen. Docket No. 87-112, 3 FCC Rcd 2113 (1988).

[3] The Commission established fifty-five regions in the Report and Order and subsequent Memorandum Opinion and Order (3 FCC Rcd 2113 (1988)). The RPCs will consist of individuals representing the various federal, state, and local public safety and special emergency authorities in each region. The RPCs will be responsible for developing regional plans that will recommend frequency assignments and will include other information relating to use of the new public safety bands.

[4] Final Report of the National Public Safety Planning Advisory Committee to the Federal Communications Commission, Gen. Docket No. 87-112 (September 9, 1987) (Final Report).

[5] We grant OARPS' request for consideration of its late-filed statement.

[6] The OARPS statement generated a number of supporting and opposition statements from various individuals and organizations. For the most part, these statements repeated previously-stated arguments and offered no significant new information. We shall, however, discuss in this section the statements of several of these parties.

[7] Philips is a manufacturer of private mobile radio, mobile phone, and paging equipment and is incorporated in the United Kingdom.

[8] *See* also, letter from Don W. Pfohl to the FCC at 1.

[9] Accordingly, General Electric's petition will be included as comments in the new proceeding.

[10] Current limitations are 1000 feet and 1000 watts.

[11] The 806-821/851-866 MHz public safety bands operate with standard 25 kHz channel spacing.

[12] *See* Section 90.209(b)(4).

[13] In addition to the assignment criteria that are to be included in regional plans, we will also place all regional plans on Public Notice and thus permit all parties that have complaints about their plan to register their concerns prior to Commission action.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-441

In the Matter of

Technical compatibility protocol
standards for equipment operating
in the 800 MHz public safety bands.

NOTICE OF INQUIRY

Adopted: August 26, 1988; Released: September 7, 1988

By the Commission:

I. INTRODUCTION

1. On December 18, 1987, we released a *Report and Order* adopting policies, service rules and technical standards to govern the usage of the 821-824/866-869 MHz public safety spectrum.[1] Five petitions were filed asking reconsideration of that *Report and Order*. One of these petitions, requesting boundary revisions of the public safety planning regions, was addressed in a *Memorandum Opinion and Order* released on April 11, 1988.[2] On July 20, 1988, we adopted a *Memorandum Opinion and Order on Reconsideration* (*Reconsideration Order*) considering the four remaining petitions. Among other things, the *Reconsideration Order* addressed a petition filed by General Electric seeking reconsideration of our decision in the *Report and Order* regarding trunking standards for equipment operating in the 800 MHz public safety spectrum. We concluded that a further proceeding would be necessary to explore fully the question of trunking standards for the 800 MHz public safety services. This Notice of Inquiry initiates that proceeding.

2. In its petition, General Electric asked that we reconsider our decision not to mandate trunking standards for equipment in the 800 MHz public safety bands. General Electric suggested that we direct the industry to develop a consensus among manufacturers and the user community on a single trunking standard. If a consensus could not be reached, it stated that this Commission should prescribe a standard. In General Electric's view, a uniform standard is necessary to eliminate incompatibility among trunked systems.

3. Although we received comments on the General Electric petition, there was insufficient information in the record for a conclusion regarding the trunking standards question. In particular, the comments did not fully discuss 1) the utility of or the timeframe necessary for developing standards, 2) whether a trunking standard would result in interoperability, or 3) the effect of trunking standards on the cost of radio equipment or on the evolution of trunking technology. Accordingly, we are initiating this inquiry to explore fully the issues relating to trunking standards for equipment operating in the 800 MHz public safety bands.

II. TRUNKING TECHNOLOGY AND INTEROPERABILITY

4. In the "conventional" mode of operation for land mobile radio equipment, one or more channels may be assigned to a licensee, and the licensee manually selects the channel to be used for each transmission. This mode of operation can result in some channels remaining unused while other channels are unavailable or are used heavily. Trunking is computerized technology that permits groups of channels to be shared dynamically by many users, resulting in more efficient use of the spectrum. When an end user wants a channel, the computer controlled trunking system selects an unused channel from among those allocated to the system and assigns it to the end user. If no channel is available, the computer may hold the request in a queue. Because of the efficiences obtained, we require the use of trunking for all systems operating with five or more channels in the 821-824/866-869 MHz public safety bands. [3] We have not, however, specified that a particular trunking technology be employed.

5. All major manufacturers of 800 MHz public safety radio equipment produce equipment using trunking technology. Many of these manufacturers, however, use different trunking technologies. The signalling mechanisms used to permit mobile radios to communicate with control stations, the actual control channels used to enable this communication, and other factors are different among systems. As a result, users of one system may not be able to communicate with users of another system, even if the two systems are operating on the same channels. Within a particular geographic area, however, each licensee of a trunked system has exclusive use of specific channels, and different users in the same area would never be licensed on the same channels. Thus, communication between systems operating in the same region with the same trunking protocols would not be possible since the systems would not be operating on the same frequencies. To achieve full interoperability among different users, even in an environment where a single trunking standard exists, would require the operating frequencies of one system to change, or "roam," to match the trunking frequencies of another. Users with compatible systems could communicate with each other if both users knew each other's frequencies and their radios could be programmed to operate on these frequencies. Interoperability among systems, however, when frequencies are not known in advance (*e.g.*, during major emergency situations where many public safety agencies are attempting to inter-communicate) would require radios with a "roaming" capability.

6. The adoption of a single trunking standard that would require the trunking systems of all manufacturers to use the same computer signalling protocols would permit users of these systems to communicate and achieve interoperability only if the systems were also equipped to operate on some or all of the same frequencies and the signalling protocols were sophisticated enough to direct the mobile units to the new channels, or if fixed facilities were appropriately interconnected. For example, mobile units would have to be designed to recognize and respond to control channels that may be on different frequencies for each system, and a method would have to be devised to prioritize and coordinate operations among many systems.

7. In our *Report and Order*, we designated five national mutual aid channels to be used in the conventional mode as a means of ensuring interoperability among all users of public safety equipment in the 821-824/866-869 MHz spectrum. We also permitted regional planning committees to designate additional mutual aid channels as necessary to achieve adequate interoperability in their particular regions. General Electric asked that we go further and mandate a single trunking standard to be used nationwide. In order for the Commission to resolve this matter, a number of important issues must be addressed.

III. QUESTIONS ABOUT TRUNKING STANDARDS

Effect of Trunking Standards on Equipment Price and Technology

8. Even if full interoperability among trunked systems could not be achieved, there may be benefits to having all manufacturers design trunked radios to the same trunking protocol. Currently, once a decision is made to buy a particular brand of equipment, all subsequent purchases must be either from the same manufacturer or from one who builds compatible equipment. If there were a uniform trunking protocol, users would not be "locked" into a particular manufacturer for future equipment purchases. Establishing such a protocol, however, might affect future technological developments. In the cellular radio area, for example, all radios are compatible, with 30 kHz bandwidth, analog (voice) channels, and standardization has driven down the price of equipment. The cellular industry is developing digital technology, which will facilitate the offering of enhanced services, currently limited by analog technology.

Question 1 : Comment generally on the advantages and disadvantages of establishment of a trunking standard. Consider specifically the effect that establishment of a trunking standard might have on the cost and availability of equipment and on technological development. For example, what effect would such a standard have on development of digital technologies?

Existing Trunking Technology

9. As noted above, the Commission is aware of various methods of trunking that are used in public safety land mobile equipment. For example, one system uses a dedicated control channel, while another uses supervisory inaudible tones on each channel for control purposes; one system holds calls in queue when the system is busy, while another does not. We ask the following questions to gain up-to-date information on current trunked system technologies.

Question 2 : Manufacturers of trunked systems are invited to furnish technical descriptions of their trunked systems and descriptions of how these systems function. To what extent and at what price is system technology made available to other manufacturers to allow them to produce compatible equipment? Even if licensing of the relevant patents is required, the licensing price would not be regulated, so what effect would picking a standard have on the price of equipment? Should the cost of licensing a particular manufacturer's patent be a consideration in determining if that manufacturer's standard should be selected?

System Interoperability

10. A number of the comments on the General Electric petition indicated that the adoption of a trunking standard would enable public safety and special emergency entities to communicate with one another in the trunked mode. The comments provided little discussion, however, as to exactly *how* such inter-communication would be achieved, as discussed above. Further, we must consider the possibility that a single protocol may not be necessary if end user equipment can respond to a number of protocols. Accordingly, we ask the following questions and request that commenters respond to each question.

Question 3 : How would the adoption of a single trunking standard permit interoperability among trunking systems operating on different channels? Describe the existing technology (hardware and software) that would permit communication between trunking systems operating on different channels or that would enable end user equipment to operate with all existing trunking protocols. If this technology does not currently exist, indicate how long it would take for the technology to be developed.

Standards for 800 MHz Public Safety Bands

11. At present, there are many users operating on the 70 channels in the existing 806-821/851-866 MHz public safety bands. This raises a number of questions as to whether a trunking standard should apply to the new allocation only or to the entire 800 MHz public safety spectrum, particularly as the new public safety bands were chosen to be adjacent to the existing bands to permit compatibility and expansion for existing systems.[4]

Question 4 : Should a mandated trunking standard be applied just to the newly allocated 821-824/866-869 MHz bands or should the standard apply to all of the 800 MHz public safety bands, including all the public safety assignments in the 806-821/ 851-866 MHz bands? Explain the advantages and disadvantages of each approach. If trunking standards were applied only to the 821-824/866-869 MHz band, would existing public safety systems be able to expand into that spectrum? If trunking standards were applied to both bands, how would that transition be accomplished for the public safety channels in the 806-821/851-866 MHz bands?

Timing

12. Given the need for public safety frequencies in some areas of the country, the length of time that would be required to develop a standard is an important factor in determining whether such a standard should be pursued.

Question 5 : If the Commission determines that a single trunking standard should be adopted, how long would it take for the industry to develop and agree upon such a standard, and how long would it be before equipment using this standard would be available on the market? Please provide evidence in support of your time estimates.

IV. SUMMARY

13. We invite all interested parties to comment on these issues relating to trunking standards for 800 MHz public safety radio equipment. We specifically encourage entities involved in both the manufacture and use of this equip-

ment to submit responses to these questions. Because we believe that these issues should be resolved quickly, we will not approve any requests for extensions of time of the comment or reply comment periods.

14. Accordingly, we adopt this Notice of Inquiry under the authority contained in Sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 403. Pursuant to the procedures set out in Section 1.415 of our Rules, 47 C.F.R. § 1.415, interested persons may file comments within 30 days of the date of publication of this item in the Federal Register and may file reply comments within 15 days of the date for filing comments. We will consider all relevant and timely comments before taking final action in this proceeding. In reaching its decision, the Commission may consider information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and the fact of our reliance on such information is noted in any subsequent actions.

15. In accordance with the provisions of Section 1.419 of the Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials with the Secretary of the Commission. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Persons who wish to participate informally may do so by submitting one copy. All comments will be given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] Memorandum Opinion and Order, Gen. Docket No. 87-112, 3 FCC Rcd 2113 (1988).

[3] *See* para. 37, Report and Order.

[4] *See* Report and Order in General Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825, 1837-38 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUDIO ENTERPRISES, INC., File No. ENF-88-04

Apparent Liability for Forfeiture

ORDER

Adopted: August 17, 1988; Released: August 19, 1988

By the Chief, Common Carrier Bureau:

1. On August 17, 1988, Audio Enterprises filed a motion for an extension of time in which to respond to the Notice of Apparent Liability (NAL) in the above-captioned proceeding. Audio Enterprises claims that an additional 30 days is necessary primarily because of the breadth and complexity of the issues raised by the NAL.

2. It is the policy of the Commission not routinely to grant extensions of time. Section 1.46(a) of the Commission's rules, 47 C.F.R. § 1.46(a). However, to the extent that good cause for an extension is demonstrated, we may consider granting more time. *See Public Notice, Motion for Extension of Time before the Common Carrier Bureau,* 44 Rad. Reg. 2d (P&F) 96 (1978). Our criteria for granting such requests are that the extension be in the public interest, cause no harm to any party in the proceeding, and cause no significant delay. An extension of time may also be appropriate where it is shown that the matter is unusually complex and that additional time is necessary to provide the Commission with an adequate pleading.

3. In view of the serious nature of the findings in the NAL, we believe it is important to move ahead expeditiously and avoid any undue delay. However, we agree that responding to the number of complex issues in the NAL may require more time. A relatively brief extension of time will not significantly slow down this proceeding. Therefore, in the interest of permitting the development of a thorough response to the notice, we believe that extending Audio Enterprises' response time would be reasonable.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(j) and 5(c) of the Act, 47 U.S.C. §§ 154(j), 155(c), and authority delegated in Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, a 30-day extension of time IS GRANTED and Audio Enterprises is directed to respond to the Notice of Apparent Liability no later than **September 19, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-397

In the Matter of

Amendment of Section 73.202(b), RM-6326
Table of Allotments,
FM Broadcast Stations.
(Essex, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1988; Released: September 7, 1988

By the Deputy Chief, Policy and Rules Division:

1. Howard B. Anderson (petitioner), has requested the allotment of FM Channel 255B to Essex, California, as a first local broadcast service. Petitioner states that he intends to apply for authority to build and operate the proposed Essex facility, if it is allotted.

2. Petitioner asserts that while he intends to serve the needs and interests of Essex, his main objective is to provide service to the large mobile population travelling daily along Interstate 40 between Barstow, California and Flagstaff, Arizona. Petitioner describes Interstate 40 as the "primary all-weather route into the entire state of California, as well as the major transportation link between Southern California and Arizona." In support of his proposal, petitioner claims that at the Essex Road Interchange of Interstate 40, an annual average of 7000 vehicles per day pass through and that this figure increases to 7,500 per day during peak summer months. Moreover, petitioner comments that Interstate 40 passes through remote areas of the Mohave Desert, for which no means of public communication is presently available to motorists travelling in that area. Thus, petitioner claims there is a public need for broadcast service to Essex as well as the remote areas along Interstate 40. In support, petitioner cites *Yermo and Mountain Pass, California*, 44 FR 4486 (1979), where the Commission permitted similar allotments (based on the proposition they would provide service to large unserved and underserved areas).[1]

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Essex is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Essex is incorporated, or that it has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 19917 (1983); *Ellwood, California*, 50 FR 13031 (1985).

4. While we do not dispute that the transient population travelling in remote areas along Interstate 40 may have a need for radio service, the petitioner's primary obligation is to serve the needs and interests of the community to which he is licensed.[3] Therefore, petitioner is requested to clarify whether he intends to discharge his primary service obligation. We believe that petitioner's proposal to provide Essex with its first local service, should it ultimately be deemed a community, warrants further consideration. Therefore we shall invite comments on the proposal, as indicated *infra*.

5. A staff engineering analysis indicates that Channel 255B can be allotted to Essex consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located at least 3.1 kilometers (1.9 miles) north of the community[4] to avoid short-spacing to Channel 255B, Cuervos, Baja, Mexico.[5]

6. Essex is located within 320 kilometers (199 miles) of the U.S.-Mexico border. Therefore, the Commission must obtain concurrence in this proposal by the Mexican government before Channel 255B can be allotted.

7. In view of the above, we believe it is appropriate to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Essex, California, as reflected below:

	Channel No.	
City	Present	Proposed
Essex, California	--	255B

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **October 28, 1988,** and reply comments on or before **November 14, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Nadine S. Samter, Esq.
Hogan and Hartson
Columbia Square
555 - 13th Street, N.W.
Washington, D.C. 20004-1109

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are

advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We believe petitioner's reliance on Yermo is not fully supportive since Yermo's status as a bona fide community was not in question and that of Mountain Pass was established.

[2] We do note that although Essex is listed in the Rand McNally Commercial Atlas, to which it attributes a population of 75 persons, mere geographical location is not sufficient to establish "community"status. *See* Vimville, Mississippi, 48 FR 5974 (1983).

[3] *See* Section 73.1120 of the Commission's Rules.

[4] Reference coordinates of the restricted site are 34-45-51 and 115-15-07.

[5] Reference coordinates of Channel 255B at Cuervos are 32-37-35 and 114-51-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TENNECO	File Nos. 121-DSE-P/L-86
COMMUNICATIONS	122-DSE-P/L-86
CORPORATION	123-DSE-P/L-86

Request for Permission to Operate Three temporary-fixed 3.5 Meter Earth Terminal Antennas that are not in Conformance with the Sidelobe Requirements of 47 C.F.R. § 25.209

ORDER

Adopted: August 29, 1988; Released: September 8, 1988

By the Domestic Facilities Division:

1. Tenneco Communications Corporation (Tenneco) requests authority to operate three temporary-fixed (transportable) earth stations for narrow band digital transmission (Emission 100F9Y) in the 5925-6425 MHz frequency band. The applications propose use of 3.5 meter Vertex antennas that are not in compliance with the sidelobe requirements of Section 25.209 (a) of the Commission's Rules.[1] The applications are otherwise consistent with the Commission's Rules. The applications are unopposed.[2]

2. Section 25.209(f) of the Commission's Rules [3] permits the authorization of earth station antennas that do not meet the sidelobe requirements of Section 25.209(a) provided that the applicant demonstrates that the operation will not result in unacceptable levels of interference under conditions of uniform 2' spacing and that reasonable efforts were made to use antennas that meet these sidelobe standards.[4]

3. In support of its request, Tenneco states that the 3.5 meter antennas will be used primarily on offshore drilling platforms in the Gulf of Mexico where the use of 4.5 meter or larger antennas[5] is impractical due to space and weight limitations. Tenneco also emphasizes that during inclement weather conditions, the additional windload factor[6] associated with larger antennas could result in the antenna becoming airborne, endangering life and property as well as loss of communications during an emergency.

4. With regard to potential inter-satellite interference,[7] Tenneco notes that the Commission has determined that an antenna that complies with the sidelobe requirements of Section 25.209 and operates with a power density into the antenna of -2.7 dBW/4 KHz would not cause unacceptable interference under uniform 2' spacing conditions.[8] Tenneco makes a showing that operation of its antennas with the power density into the antenna restricted to -8.9 dBW/4 KHz would present interference characteristics no worse that those of a compliant antenna operating with the power density noted above.[9]

5. We find that Tenneco has adequately demonstrated the need for these small 3.5 meter antennas and has established that compliant antennas in this size range are not readily available. We also find that Tenneco has adequately demonstrated that its proposed use of these antennas will not adversely affect the Commission's 2' spacing policy.

6. Accordingly, IT IS ORDERED that Application File Nos. 121-DSE-P/L-86, 122-DSE-P/L-86 and 123-DSE-P/L-86 ARE GRANTED and Tenneco Communications Corporation IS AUTHORIZED to operate the earth stations for narrowband digital transmissions in the 5925-6425 MHz frequency band with a maximum power density into the antenna of -8.9 dBW/4 KHz and subject to the standard conditions applicable to temporary-fixed earth stations as specified on the instrument of authorization for these facilities.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 25.209(a).

[2] Public Notice of the applications was given August 19, 1987. *See* Report No. DS-656. No comments were received.

[3] 47 C.F.R. § 25.209(f).

[4] Earth Station Antennas that are not in Conformance with the Sidelobe Requirements of 47 C.F.R. § 25.209, 3 FCC Rcd 2063 (1988).

[5] The Commission has determined that antennas with diameters less than 4.5 meters that comply with the sidelobe requirements of Section 25.209 are not readily available. *See* Equatorial Communication Services, DA 87-856 (released July 10, 1987).

[6] A 4.5 meter antenna has a surface area approximately two-thirds greater than a 3.5 meter antenna.

[7] Tenneco has included in its filing antenna patterns for the Vertex 3.5 meter antenna that indicate a maximum variance of 6.2 dB with the sidelobe requirements of Section 25.209(a).

[8] *See* Routine Licensing of Earth Stations in the 6 GHz Band Using Antennas Less than 9 Meters in Diameter for Narrowband Transmissions, Mimeo No. 7237 (released September 25, 1985).

[9] Tenneco uses a methodology essentially identical to that described in Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, Mimeo No. 3588 (released April 9, 1986) at para. 18.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-424

In the Matter of

Amendment of the Maritime Services Rules to allow ships to use 406.025 MHz emergency position indicating radiobeacons for distress alerting and search and rescue functions. RM-5166

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1988; Released: September 9, 1988

By the Commission:

1. This *Report and Order* amends Part 80 of the Commission's Rules to permit ships to use 406.025 MHz Emergency Position Indicating Radiobeacons (406 MHz radiobeacons) for distress alerting and search and rescue functions.

I. BACKGROUND

2. Emergency radiobeacons are used to alert others of a distress situation and to assist search and rescue units in locating those in distress. In the United States emergency radiobeacons carried on board aircraft are called Emergency Locator Transmitters (ELTs). Emergency Position Indicating Radiobeacons (EPIRBs) are emergency radiobeacons carried on board ships. ELTs and EPIRBs currently operate on both 121.500 MHz and 243.000 MHz.[1]

3. To ensure the probability of detecting ELTs and EPIRBs on a global basis, the United States, Canada, France, and the Soviet Union have launched COSPAS and SARSAT low polar-orbiting satellites that monitor wide areas of the globe for distress signals.[2] Norway, the United Kingdom, Bulgaria, Finland, Denmark and other countries have joined the four COSPAS/SARSAT partners as "investigators" in this project. The COSPAS satellites detect distress signals on 121.500 MHz and 406.025 MHz; the SARSAT satellites detect distress signals on 121.500 MHz, 243.000 MHz and 406.025 MHz. To enhance reliability, the COSPAS/SARSAT Partners have agreed that the carrier frequency of the 406 MHz radiobeacons must be phase modulated by a digital signal and must provide distress alerting, homing assistance, type of emergency, country and identification code of the station in distress, and other pertinent information to facilitate search and rescue functions globally.

II. PROPOSAL

4. The *Notice of Proposed Rule Making (NPRM)* [3] in this proceeding proposed to amend the Commission's Maritime Services Rules to authorize ships to use 406 MHz radiobeacons. This action was in response to a petition for rule making (RM-5166) filed by the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA). NOAA stated that the distress monitoring satellites of the COSPAS/SARSAT System have completed their development test phase and are prepared to support global monitoring of distress transmissions. Further, NOAA noted that Canada, France, the Soviet Union, Norway, the United Kingdom, Sweden, Denmark, and Bulgaria have initiated regulatory action for the use of emergency radiobeacons in the 406.000-406.100 MHz band. *See* NOAA petition at 1. No comments were filed in response to the petition. The United States Coast Guard (USCG) and the Interagency Committee on Search and Rescue (ICSAR), in letters dated February 24, 1986, and January 22, 1986, respectively, urged the early initiation of rule making to permit the voluntary use of 406 MHz radiobeacons. The USCG and ICSAR pointed out that the COSPAS/SARSAT System has contributed to the rescue of over 500 individuals using existing radiobeacons operating on 121.500 MHz. They indicated that potentially greater benefits for search and rescue authorities would be derived from implementation of 406 MHz radiobeacons.

5. Accordingly, in the *NPRM* we proposed to amend Part 80 of the Rules to authorize ships to use 406 MHz radiobeacons. We emphasized that the proposed rules would not authorize the use of 406 MHz radiobeacons in lieu of the EPIRBs that certain types of ships are required to carry. *See* 1 FCC Rcd 549-550 (1986). We also stated that since nearly all United States aircraft are required by Federal Aviation Regulations to carry ELTs operating on 121.500 MHz and 243.000 MHz[4] there was little interest in the aviation community in additionally providing for the voluntary use of 406 MHz radiobeacons on board aircraft at this time. Nevertheless, we requested comments on this issue.

6. Although we concurred with the view held by NOAA, USCG and ICSAR, that early implementation of 406 MHz radiobeacons could provide improvement in maritime distress alerting and search and rescue operations, we were concerned that the voluntary operation of the 406 MHz radiobeacons might result in problems similar to those currently encountered with the 121.500 MHz radiobeacons. ICSAR in a letter dated January 22, 1986, indicated that there are significant false alarm and reliability problems with radiobeacon operations on 121.500 MHz.[5] We wanted to avoid such problems with equipment operating on 406 MHz. Therefore, we requested comments on the following questions:

(a) Should the user community include all ships as proposed or should the user community initially be limited to ships required to carry EPIRBs?

(b) Since there are limited resources available to assist in locating activated 406 MHz radiobeacons in the marine environment, should we wait until the COSPAS/SARSAT System is fully implemented before adopting final rules in this proceeding?

(c) If the voluntary use of the 406 MHz radiobeacon in aircraft is supported by the comments, how can the high false activation rate experienced with 121.500 MHz ELTs be avoided?[6]

(d) Are rules referencing only the International Radio Consultative Committee (CCIR) technical specifications sufficient to permit the manufacture and voluntary use of 406 MHz radiobeacons to approve performance standards before adopting final rules?[7]

(e) Should a single identification scheme be selected for these devices?

III. COMMENTS/DISCUSSION

A. *Use of 406 MHz Radiobeacons*

7. None of the commenters[8] opposed the use of 406 MHz radiobeacons on board ships. The majority of commenters contended that this use would provide the following benefits:

(a) Save additional lives;

(b) Provide global coverage;

(c) Detect and recognize multiple numbers of radiobeacons transmitting simultaneously, thus eliminating the current confusion created when multiple transmissions occur on 121.500 MHz;

(d) Improve the capability to "track" the position of the signals emitted by radiobeacons;

(e) Improve the capability to verify distress alerts before initiating search and rescue functions; and

(f) Improve system accuracy and reduce search time.

8. NASA, NOAA, RTCM, USAF and USCG argue that the COSPAS/SARSAT System is currently fully developed and ready for operational use. They claim that COSPAS/SARSAT satellites and ground stations are currently in position to serve the United States user community. Thus, they believe there is no reason to delay adoption of final rules. Comments of NASA at 2, NOAA at 5, RTCM at 3, USAF at 2 and USCG at 4. NOAA states that a full complement of four satellites is in operation and through NASA it has contracted with the Radio Corporation of America (RCA) for replacement satellites to provide services until the year 1998. Procurement planning for follow-on satellites and COSPAS/SARSAT search and rescue capability is in process. Comments of NOAA at 5. NOAA noted that although the COSPAS/SARSAT System is currently operational, a number of improvements and enhancements are planned. Nevertheless, implementation should not be delayed because improvements and enhancements will continue to be made in the future. Comments of NOAA at 6.

9. In response to the question regarding which ships should carry 406 MHz radiobeacons, RTCM, NOAA and USAF support the voluntary carriage of these devices by the entire maritime community. Comments of RTCM at 2, NOAA at 3, and USAF at 2. Telonics supports permitting the use of 406 MHz radiobeacons by any ship currently required to carry EPIRBs. Comments of Telonics at 6. USCG believes that 406 MHz radiobeacons could satisfy the requirements of either voluntarily or compulsorily-equipped ships. It was USCG's opinion, however, that in most cases the use of a VHF ship radio station will provide the quickest and most effective means for emergency alerting and communicating with search and rescue forces. Accordingly, USCG supports the carriage of 406 MHz radiobeacons by any ship that is equipped with a VHF ship station. Comments of USCG at 4.

10. We agree with the commenters that there is no reason to delay the use of 406 MHz radiobeacons by ships. The use of the 406 MHz radiobeacons has numerous advantages as described above and undoubtedly will improve distress alerting and facilitate search and rescue operations. Accordingly, we are authorizing the use of 406 MHz radiobeacons by any ship that is also equipped with a VHF ship station. This will make the 406 MHz radiobeacon available to most U.S. ships and boats. The USCG may adopt regulations to substitute for existing EPIRBs or require the mandatory carriage of 406 MHz radiobeacons. Mandatory EPIRB carriage requirements are contained in USCG regulations.[9]

B. " *Homing* "

11. In response to the question in the *NPRM* concerning the limited ability to locate activated 406 MHz radiobeacons, NASA states that the search and rescue (SAR) forces of USCG, USAF, Civil Air Patrol (CAP) and other federal, state, and local authorities have direction finders for "homing" on 121.500 MHz but not on a 406.025 MHz signal. Equipment for "homing" on the 406.025 MHz signal is not currently available on the market. Accordingly, NASA notes there is consensus by all SAR forces to maintain 121.500 MHz as the "homing" frequency for the 406 MHz radiobeacons. A 25 milliwatts signal would provide a "homing" range of 15 nautical miles at an altitude of 1000 feet. NASA envisioned that the 406.025 MHz signal may become suitable for "homing" sometime in the 1990s if low cost equipment and the required field experience are developed. Furthermore, administrations of other nations require or plan to require all 406 MHz radiobeacons to include 121.500 MHz "homing" transmitters. As a result, use of 406.025 MHz by the United States alone for "homing" would reduce greatly the ability of SAR forces from other nations to assist in SAR activities involving U.S. ships. The ICSAR, NASAR, NOAA, USAF and USCG comments supported NASA on this issue. USCG stated that administrations of other nations require or plan to require all 406 MHz radiobeacons to include 121.500 MHz "homing" transmitters. NOAA added that any new problems created using the 121.500 MHz frequency for this purpose will be mitigated by its low power level and by the use of the identification information obtained from the radiobeacon's 406.025 MHz transmissions which will assist SAR forces to contact the licensee and determine whether such transmissions are real distress signals or false alarms. Comments of NASA at 5, ICSAR at 1, NASAR at 1, NOAA at 10, USAF at 1, and USCG at 2 and 5.

12. In view of the strong support in the comments, we will require that 406 MHz radiobeacons employ low power 121.500 MHz transmitters for "homing". This solution to the lack of "homing" capability on 406.025 MHz represents a consensus among U.S. organizations involved in search and rescue operations and is consistent with the approach taken internationally.

C. *Use of 406 MHz Radiobeacons by Other Services*

13. NASA, NASAR, NOAA, USAF and USCG support the eventual use of 406 MHz radiobeacons by the aviation community. AOPA, NASA and NOAA recommend, however, that the Aviation Services Rules be consistent with the national standards that are currently being developed for 406 MHz ELTs by the Radio Technical Commission for Aeronautics (RTCA). Therefore, it is premature to amend the Aviation Services Rules at this time. Comments of AOPA at 1, NASA at 2 and 4, NASAR at 1, NOAA at 5 and 11, USAF at 26, USCG at 7, and reply comments of NASA at 3. Telonics supported the voluntary use of 406 MHz radiobeacons in addition to the currently required safety equipment. Comments of Telonics at 6. In connection with this issue, NASAR supports the development of a land-based Electronic Personal Locator ELT to use 406.025 MHz with a 121.500 MHz homing capability for search and rescue forces. NASAR letter to ICSAR at 1.

14. We conclude, as indicated in the *NPRM* and confirmed by the comments, that it is premature to include rules for the operation of 406 MHz radiobeacons on board aircraft. Further, the comments suggesting the development of an Electronic Personal Locator ELT using 406.025 MHz are beyond the scope of this proceeding.

D. *Technical and Performance Standards*

15. In response to our question in the *NPRM*, NOAA, USCG, and Westinghouse feel that the COSPAS/SARSAT and CCIR specifications are insufficient to assure proper operation of 406 MHz radiobeacons. The Radio Technical Commission for Maritime Services (RTCM) formed a special committee consisting of concerned industry and Government organizations to study this question. In its comments RTCM included the report of Special Committee No. 110 and urges that this report be adopted in lieu of the CCIR specifications proposed.[10] NASA, NOAA, USCG and Westinghouse also urged the Commission to adopt rules that are consistent with the RTCM Recommended Standards. Comments of NASA at 5, NOAA at 9, USCG at 2 and Westinghouse at 2. NOAA states that the RTCM Recommended Standards will ensure compatibility between the radiobeacons and the COSPAS/SARSAT satellites and will meet the operational requirements of the maritime community. USCG states that RTCM examined various standards adopted or proposed by IMO, COSPAS/SARSAT, France, the United Kingdom and Canada and included selected portions in the RTCM Recommended Standards. Comments of USCG at 3. There is no opposition to the use of the RTCM Recommended Standards in lieu of the CCIR standards.

16. Telonics argues that because of the high output power requirements and the stringent temperature standards the 406 MHz radiobeacons must meet, the size of their associated portable power source would be abnormally large. To remedy this problem Telonics requests the Commission to change the transmitter's output power requirements from 5.0 watts ±2.0 dB to 5.0 watts +2.0 dB, -7.0 dB. Comments of Telonics at 5 and 6. In its reply comments NASA opposes the Telonics request as neither necessary nor desirable. NASA points out that the RTCM Recommended Standards require a somewhat less stringent operating temperature range than referenced by Telonics. NASA states that the Jet Propulsion Laboratory of the California Institute of Technology (JPL) has successfully tested batteries capable of powering a five watt radiobeacon at -20 degrees Celsius. Reply comments of NASA at 2.

17. We have reviewed the CCIR specifications and COSPAS/SARSAT test procedures. We agree with the commenters that the use of the RTCM Recommended Standards will ensure greater operational reliability between the 406 MHz radiobeacons and the COSPAS/SARSAT satellites than the CCIR standards. Further, we note that the standards developed by the RTCM Special Committee No. 110 appear to represent a consensus of the concerned industry and Government organizations. Accordingly, we are incorporating by reference the RTCM Recommended Standards dated July 31, 1987, with editorial updates of December 31, 1987.

E. *Authorization of Equipment*

18. NASA emphasized that the United States must meet its commitments to the international COSPAS/SARSAT agreements. One of the commitments is to ensure that the 406 MHz radiobeacons and the COSPAS/SARSAT satellites are compatible. To meet this commitment it is essential that 406 MHz radiobeacons installed on ships be certified by a test laboratory approved by one of the COSPAS/SARSAT Partners. Additional tests must also be performed to ensure compliance with the emission requirements of the Commission and the operational requirements of the SAR forces. To reduce confusion and redundancy for U.S. industry and users NASA recommends that enforcement of the certification standards of the various U.S. regulatory agencies be coordinated. Comments of NASA at 3 and 6.

19. USCG advocates testing by a facility recognized by one of the COSPAS/SARSAT Partners to ensure that the equipment complies with the COSPAS/SARSAT design characteristics by using the measurement methods described in Appendix B of the RTCM Recommended Standards, and testing by an independent laboratory recognized by USCG to verify that the 406 MHz radiobeacon complies with all specifications and requirements of the RTCM Recommended Standards with the exception of those associated with the measurement methods described in Appendix B. USCG offers to assist in reviewing the test results to determine their compliance with the RTCM Recommended Standards. Comments of USCG at 8. RTCM recommended somewhat similar bifurcated procedure. RTCM comments at 30.

20. Additionally, NOAA states that manufacturers seeking equipment authorization approval by the Commission must register with NOAA to obtain a group of identification codes. NOAA will maintain a data base of U.S. 406 MHz radiobeacons. To establish a unique identification for each station each code must be programmed in one radiobeacon only. Further, NOAA requests that manufacturers provide on the outside of each radiobeacon a clearly discernible label showing the unique identification code programmed in that radiobeacon.

21. We concur with the commenters' views that U.S. 406 MHz radiobeacons must meet our national requirements as well as be compatible with COSPAS/SARSAT. Further, we agree with the commenters that a coordinated, cooperative program among the concerned agencies will reduce the burdens on the Government and the public alike. Accordingly, we are adopting the following procedures for manufacturers applying for equipment authorization.

(a) A copy of the USCG certification must accompany each application for authorization of equipment submitted to the Commission; and

(b) An equipment plate or label must be provided displaying the NOAA identification code.

F. *Registration of Equipment and Licensing of Stations*

22. Telonics recommends the use of 406 MHz radiobeacons without modification of existing station licenses. Comments of Telonics at 6. NOAA and USCG recommend that all 406 MHz radiobeacons be licensed. Comments of NOAA at 8 and USCG at 8. NASA, NOAA, RTCM and USCG ask that we require registration with NOAA of all 406 MHz radiobeacon stations prior to their use. They also recommend that the registration information be maintained in a central data base readily available to the SAR forces. RTCM recommends that the registration process be simple, that it impose a minimum burden to the public, and that the registration cards contain all information essential to SAR authorities. Comments of NASA at 3, 6, and 7, NOAA at 7, RTCM at 8 and USCG at 8. NOAA also requests that manufacturers furnish with each 406 MHz radiobeacon a pre-printed registration card pre-addressed to NOAA. The card would contain the unique identification code of the radiobeacon and information from each station license applicant to facilitate search and rescue operations. Comments of NOAA at 8-9. USCG supported the NOAA registration scheme. Comments of USCG at 7.

23. USCG believes that the mandatory registration of 406 MHz radiobeacons should be accomplished through the Commission's licensing procedure. Accordingly, USCG requests the Commission require licensees to include with their license application forms the NOAA pre-addressed registration cards. The Commission would subsequently, forward the information to NOAA. NOAA states that if the Commission cannot incorporate in its licensing process all registration information required by the SAR forces, as a minimum the manufacturers should be required to provide a label on each radiobeacon stating that it is extremely important that the owner of a 406 MHz radiobeacon register the beacon identification code contained on the label with NOAA. Comments of USCG at 7 and NOAA at 8 and 9.

24. We will treat 406 MHz radiobeacons in the same manner we treat other EPIRBs. They will be required to be licensed, but will be part of the ship station license. To implement registration with NOAA through the licensing process, however, would delay the inclusion of important SAR information in the NOAA data base and be cumbersome to administer. As noted above, we will require manufacturers to provide on each 406 MHz radiobeacon a plate or label containing the registration instructions requested by NOAA. Additionally, we will require its manufacturer to include with each marketed 406 MHz radiobeacon a pre-addressed post card soliciting the name, address, telephone number, identification code and ship type of the owner for NOAA's data base.

IV. CONCLUSION

25. In summary, in this *Report and Order* we are adopting rules to authorize the use of 406 MHz radiobeacons by any ship or boat that is also equipped with a VHF ship station. Such 406 MHz radiobeacons also must employ low power 121.500 MHz transmitters for "homing" purposes. At this time it is premature to include rules for the use of 406 MHz radiobeacons on board aircraft. RTCM Recommended Standards for 406 MHz radiobeacons are incorporated by reference in the rules. Additionally, manufacturers applying for equipment authorization must submit a copy of a letter from the USCG stating that the 406 MHz radiobeacon satisfies the RTCM Recommended Standards. Manufacturers must also provide an equipment plate or label on each 406 MHz radiobeacon displaying the NOAA identification code and include a pre-addressed post card soliciting the owner's name and address, and the ship's identification code and type for NOAA's data base.

26. The rule changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

27. We certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because it will not have a significant economic impact on a substantial number of small entities. The changes proposed herein will have a beneficial effect on the maritime community by permitting the manufacturing, marketing and use of 406 MHz radiobeacons to enhance the detection of emergency signals from ships by satellites. These changes are voluntary, the market is expected to be small, and this rule making will not cause significant economic impact on any entity.

28. For the reasons stated above IT IS ORDERED, That under the authority contained in Section 4(i) and 303(g) and (r) of the Communications Act 1934, as amended, 47 U.S.C. §§ 154(i) and 303(g) and (r), the Commission's rules ARE AMENDED as set forth in the Appendix below, effective **October 24, 1988.** In accordance with the Administrative Procedure Act, 5 U.S.C. § 552(a), we incorporate by reference in the rules into Part 80 the RTCM Recommended Standards. This document is reasonably available to persons affected through the Commission's headquarters, or RTCM. Incorporation by reference will avoid unnecessary duplication in the rules.

29. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

30. A copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Final Rules

Parts 2 and 80 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS.

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. In Section 2.106 footnote "649" is revised to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

INTERNATIONAL FOOTNOTES

* * * * *

649 The use of the band 406-406.1 MHz by the mobile-satellite service is limited to low-power satellite emergency position-indicating radiobeacons (*see also* Article 38).

* * * * *

B. Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.15 a new paragraph (e)(3) is added to read as follows:

§ 80.15 Eligibility for station license.

* * * * * * * * * * *

(e) * * *

(3) A 406.025 MHz EPIRBs may be used by any ship required by U.S. Coast Guard regulations to carry an EPIRB or by any ship that is equipped with a VHF ship radio station.

3. In § 80.203 paragraphs (f), (g), (h), and (i) are changed to (g), (h), (i), and (j) respectively and a new paragraph (f) is added to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(f) In addition to the type acceptance requirements contained in Part 2 of this chapter applicants for type acceptance of 406.025 MHz radiobeacons must also comply with the type acceptance procedures contained in § 80.1061 of this part.

* * * * *

4. In Section 80.205 paragraph (a) is amended by adding emission G1D after F3N and footnote 13 as follows:

§ 80.205 Bandwidths.

(a) * * *

Class of Emission	Emission Designator	Authorized Bandwidth
* * * * *		
G1D[13]	16K0G1D	20.0
* * * * *		

13 Applicable only to 406 MHz EPIRBs.

5. In Section 80.207 paragraph (d) is amended by adding after 243.000 MHz under "Distress, Urgency and Safety" the frequency 406.025 MHz as follows:

§ 80.207 Classes of emission.

* * * * *

(d) * * *

Types of stations	Classes of emission
* * * * *	
Distress, Urgency and Safety[89]	
* * * * *	
406.025 MHz	G1D

* * * * *

6. In Section 80.209 paragraph (a)(7) is revised to read as follows:

§ 80.209 Transmitter frequency tolerances.

(a) * * *

Frequency Bands and Categories of Stations	Tolerances applicable until Jan. 1, 1990, for transmitters installed before Jan. 2, 1987	Tolerances applicable[1] to new transmitters installed after Jan. 1, 1987, and to all transmitters after Jan. 1, 1990
* * * * *		
(7) *Band 400 - 466 MHz*		
(i) EPIRBs operating on 406.025 MHz.	5	5
(ii) On-board stations.	5	5

* * * * *

7. In Section 80.223 paragraph (d) is revised to read as follows:

§ 80.223 Special requirements for survival craft stations.

* * * * *

(d) When an EPIRB is part of a survival craft station the EPIRB portion must be capable of transmitting on the frequencies and emissions contained in Subpart V of this chapter.

8. Section 80.1051 is revised to read as follows:

§ 80.1051 Scope.

This subpart describes the technical and performance requirements for Classes A, B, C, and S, and Categories 1, 2, and 3 EPIRB stations.

9. A new Section 80.1061 is added to read as follows:

§ 80.1061 Special requirements for 406.025 MHz EPIRBs.

(a) Notwithstanding the provisions in (b) of this section, 406.025 MHz EPIRBs must meet all the technical and performance standards contained in the Radio Technical Commission for Maritime Services document titled "RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs)" dated July 31, 1987, with editorial updates of December 31, 1987 (RTCM Recommended Standards). This RTCM document is incorporated by reference in accordance with 5 U.S.C. 552(a). The document is available for inspection at Commission headquarters in Washington, D.C. or may be obtained from the Radio Technical Commission for Maritime Services, Post Office Box 19087, Washington, D.C. 20036.

(b) The 406.025 MHz EPIRB must contain as an integral part a "homing" beacon operating only on 121.500 MHz that meets all the requirements described in the RTCM Recommended Standards document described in paragraph (a) of this section. The 121.500 MHz "homing" beacon must have a continuous duty cycle that may be interrupted during the transmission of the 406.025 MHz signal only.

(c) Prior to submitting a type acceptance application for a 406 MHz radiobeacon, the radiobeacon must be certified by a test facility recognized by one of the COSPAS/SARSAT Partners that the equipment satisfies the design characteristics associated with the measurement methods described in Appendix B of the RTCM Recommended Standards. Additionally, the radiobeacon must be certified by a test facility recognized by the U.S. Coast Guard to certify that the equipment complies with the U.S. Coast Guard environmental and operational requirements associated with the test procedures described in Appendix A of the RTCM Recommended Standards. Information regarding the recognized test facilities may be obtained from Commandant (G-MVI), U.S. Coast Guard, 2100 2nd Street, S.W., Washington, D.C. 20593-0001.

(1) After a 406.025 MHz EPIRB has been certified by the recognized test facilities the following information must be submitted in duplicate to the Commandant (G-MVI), U.S. Coast Guard, 2100 2nd Street S.W., Washington, D.C. 20593-0001:

(i) The name of the manufacturer or grantee and model number of the EPIRB;

(ii) Copies of the certificate and test data obtained from the test facility recognized by a COSPAS/SARSAT Partner showing that the radiobeacon complies with the COSPAS/SARSAT design characteristics associated with the measurement methods described in Appendix B of the RTCM Recommended Standards;

(iii) Copies of the test report and test data obtained from the test facility recognized by the U.S. Coast Guard showing that the radiobeacon complies with the U.S. Coast Guard environmental and operational characteristics associated with the measurement methods described in Appendix A of the RTCM Recommended Standards; and

(iv) Instruction manuals associated with the radiobeacon, description of the test characteristics of the radiobeacon including assembly drawings, electrical schematics, description of parts list, specifications of materials and the manufacturer's quality assurance program.

(2) After reviewing the information described in paragraph (1) above the U.S. Coast Guard will issue a letter stating whether the radiobeacon satisfies all RTCM Recommended Standards.

(d) A type acceptance application for a 406.025 MHz EPIRB submitted to the Commission must also contain a copy of the U.S. Coast Guard letter that

states the radiobeacon satisfies all RTCM Recommended Standards, a copy of the technical test data, and the instruction manual(s).

(e) An identification code, issued by the National Oceanic and Atmospheric Administration (NOAA) the United States Program Manager for the 406.025 MHz COSPAS/SARSAT satellite system must be programmed in each EPIRB unit to establish a unique identification for each EPIRB station. With each marketable EPIRB unit the manufacturer or grantee must include a postage pre-paid registration card addressed to: NOAA, NESDIS, USMCC Data Base Manager, Federal Building 4, Washington, D.C. 20233. The registration card must include the EPIRB identification code and must request the owner's name, address, telephone number and type of ship.

(f) To enhance protection of life and property it is imperative that each 406.025 MHz EPIRB be registered with NOAA. Therefore, in addition to the identification plate or label requirements contained in §§ 2.925, 2.926, and 2.1003 of the Commission's Rules, each 406.025 MHz EPIRB must be provided on the outside with a clearly discernable permanent plate or label containing the following statement: "It is extremely important that the owner of this 406.025 MHz EPIRB registers the NOAA identification code contained on this label with the National and Oceanic Atmospheric Administration (NOAA) whose address is: NOAA, NESDIS, USMCC Data Base Manager, Federal Building 4, Washington, D.C. 20233."

(g) For 406.025 MHz EPIRBs whose identification code can be changed after manufacture, the identification code shown on the plate or label must be easily replaceable using commonly available tools.

FOOTNOTES

[1] The exception is Class "C" EPIRBs which operate on the maritime VHF frequencies 156.750 MHz and 156.800 MHz.

[2] COSPAS is the Soviet Union's abbreviation for "Space System for Search of Vessels in Distress." SARSAT is the United States abbreviation for "Search and Rescue Satellite-Aided Tracking."

[3] PR Docket No. 86-424, 1 FCC Rcd 549 (1986).

[4] *See* 46 C.F.R. § 91.52.

[5] The 1985 Air Force Rescue Coordination Center Annual Report - Inland Search and Rescue, reported a 97 percent false activation rate for emergency radiobeacons operating on 121.500 MHz.

[6] *See* 1 FCC Rcd 549-550 (1986).

[7] CCIR recommended certain technical specifications for Global Maritime Distress and Safety System (GMDSS) 406 MHz radiobeacons. *See* CCIR Recommendation 633, "Transmission Characteristics of a Satellite Emergency Position Indicating Radio Beacon (Satellite EPIRB) System Operating through a Low Polar Orbiting Satellite System in the 406.0-406.1 MHz Band." Additionally, the Sub-Committee on Radiocommunications of the IMO has approved performance standards for 406 MHz radiobeacons. *See* International Maritime Organization, 33rd session, Agenda item 4, COM 33/WP.2/Add.1, titled "Performance Standards for Shipborn Radio Equipment" (July 13, 1987).

[8] The following parties filed comments: Aircraft Owners & Pilots Association (AOPA), ICSAR, National Aeronautics and Space Administration (NASA), National Association for Search and Rescue (NASAR), NOAA, RTCM, Telonics, Inc. (Telonics), United States Air Force (USAF), USCG, and Westinghouse Communications Services, Inc. (Westinghouse). Reply comments were filed by NASA. AOPA represents U.S. general aviation aircraft owners and pilots. ICSAR consists of U.S. agencies responsible for and actively involved in search and rescue. USCG and USAF are two agencies directly responsible for domestic search and rescue. NOAA is the agency that represents the U.S. in the COSPAS/SARSAT joint venture and administers the COSPAS/SARSAT Program domestically. NASA is the U.S. technical representative in the COSPAS/SARSAT Program. NASAR is dedicated to the advancement of the state of the art of the search and rescue operations. RTCM is the association whose primary goal is to find sound technical solutions to problems involving electronics and telecommunications in maritime operations. Telonics is a U.S. firm which manufactures 406 MHz radiobeacons. Westinghouse is a contractor to NASA.

Two letters attached to the ICSAR comments were addressed to the ICSAR Chairman. One was dated March 30, 1987, and was signed by the President of NASAR, Lois Clark McCoy. The other was dated June 30, 1987, and was signed by the Commander of the Aerospace Rescue and Recovery Services Headquarters, USAF Colonel Robert S. Michelsen. The views contained in these letters are treated as NASAR and USAF comments respectively.

[9] The USCG has already initiated a rule making proceeding that proposes the mandatory carriage of 406 MHz radiobeacons by certain fishing vessels. *See* 52 Fed. Reg. 33449 (1987).

[10] The RTCM comments included a report of its Special Committee No. 110, dated July 31, 1987, with erratum of August 14, 1987. This report is titled "RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs)" (RTCM Recommended Standards) and includes suggested technical and performance standards for three categories of EPIRBs: Category 1, Category 2, and Category 3. Category 1 has "float free" requirements, Category 2 is similar to the Category 1 but without the "float free" requirements, and Category 3 is a less expensive type without "float free" requirements, and with less stringent environmental standards and reduced operational life. Appendix "A" of the RTCM Recommended Standards contains the test procedures for the approval of the environmental and operational standards of 406 MHz radiobeacons. Appendix "B" contains the "bench test" methods and procedures for the approval of the technical standards of the 406 MHz radiobeacons. On January 12, 1988, RTCM submitted to the Commission a copy of its recommended standards dated July 31, 1987, with editorial updates of December 31, 1987. RTCM stated that an editorial update of its recommended standards was required to conform to proposals of the IMO Subcommittee on Radiocommunications, the recommendations of USCG to the Commission in connection with the instant proceeding, and the decision of the 4th Meeting of the COSPAS/SARSAT Steering Committee.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure	**CC Docket No. 78-72**
Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board	**CC Docket No. 80-286** **CC Docket No. 86-297**

ERRATUM

Released: September 9, 1988

1. On June 27, 1988, this Commission adopted an Order on Reconsideration and Supplemental Notice of Proposed Rule Making in the above captioned proceeding. *Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board,* CC Docket Nos. 78-72, 80-286, and 86-297, FCC 88-216, released August 8, 1988. The following amendments have been made to that Order:

2. In APPENDIX A, at page 4, delete the entire change that begins "On page 17,250, Appendix-Glossary, . . . 1984".

3. Change line 1 of APPENDIX B from "VER 03/24/88" to read "VER 08/26/88".

4. Change data disk lines 11, 58, 110, and 168 from "APPENDIX C" to read "APPENDIX B".

5. Replace the text shown on lines 171 through 173 of Appendix B - Section 4 with "Enter all revenue accounting expenses that would have been included in Account 662, Part 31 (USOA). To determine these expenses use the same methodology that was used to prepare your 1988 tariff filing."

6. Appendix B - Section 4 is revised to provide separate data input areas for Class A and Class B carriers (*See* lines 175 through 194).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

(VER:08/26/88)

FEDERAL COMMUNICATIONS COMMISSION
SERVICES (ACCOUNT 6620)
TOTAL STUDY AREA

(USE WHOLE DOLLAR AMOUNTS)

##
APPENDIX B - SECTION 1

FILE RENAMING INSTRUCTIONS:

TO INSURE ACCURACY IN SUMMATION OF THE DATA, PLEASE CHANGE THE CURRENT FILE NAME (6620.WK1) TO AN EIGHT (8) CHARACTER FILE NAME WHERE THE FIRST TWO CHARACTERS ARE THE INITIALS OF THE COMPANY NAME, THE SECOND TWO CHARACTERS ARE THE INITIALS OF THE STUDY AREA, AND THE REMAINING 4 CHARACTERS ARE "6620". THEREFORE, AN EXAMPLE FILE NAME FOR BELL ATLANTIC'S PENNSYLVANIA STUDY AREA WILL BE "BAPA6620.WK1".

NOTE: DO NOT ADD ROWS OR DELETE COLUMNS OR MAKE ANY CHANGES IN THE WORKSHEET. ANY COMMENTS CAN BE MADE IN THE FOOTNOTE SECTION AT THE END OF THE WORKSHEET.

****

MAILING ADDRESS:

_____

_____

_____

_____

_____

CONTACT PERSON: _____

TELEPHONE NUMBER: _____

COMPANY FILING DATA _____

STUDY AREA _____

STUDY AREA CODE (use six digit code) _____

##

APPENDIX B - SECTION 2

FORMER PART 67 RULES

-PART 31 ACCOUNTS (1987 DATA)-

(USE ACTUAL YEAR-END DATA, NOT ANNUALIZED DATA)

FORMER CATEGORIES IN ACCT. 662-REVENUE ACCOUNTING

CATEGORY	ACCOUNT 662-REV. ACCOUNTING EXP. STATE	INTERSTATE	TOTAL
TOLL TICKET PROCESSING			0
LOCAL MESSAGE PROCESSING EXPENSE		XXXXXXX	0
OTHER BILLING AND COLLECTING PROCESSING EXP			0
OTHER ACCESS CHARGE BILLING EXPENSE			0
END USER COMMON LINE ACCESS CHG BILLING EXP			0
TOTAL-ACCT 662 REV. ACCT.	0	0	0
REV ACCTG EXP IND & O/H EXP (RELIEF AND PENSONS, RENT, OR ANY OTHER ITEMS NOT INCLUDED IN ABOVE EXPENSES)			0
REV ACCTG PLANT O/H & RETURN (NET RETURN=PLANT LESS RESERVES TIMES RATE OF RETURN PLUS ADJUSTMENT FOR IDC & ITC, IF APPLICABLE. THIS IS THE NET RETURN ON ANY PLANT WHICH WOULD BE ASSIGNED INDIRECTLY BY PART 67 AS A RESULT OF THE REVENUE ACCOUNTING EXPENSE ALLOCATION).			0
OTHER OVERHEAD (FEDERAL AND STATE INCOME TAXES AND OTHER INDIRECT EXPENSES AND TAXES WHICH WOULD BE ALLOCATED INDIRECTLY BY PART 67 AS A RESULT OF THE REV ACCOUNTING EXPENSE ALLOCATION. USE STATUTORY TAX RATE FOR THE DATA SUBMITTED).			0
TOTAL COMPANY REVENUE REQUIREMENTS	0	0	0

98	TOLL MESSAGES			0
99				
100	USER COUNTS			
101	----------			
102	TOLL (ALLOCATED ON TOLL MESSAGES)	0	0	
103	INTERSTATE PRIVATE LINE	XXXXXXX		0
104	STATE PRIVATE LINE		XXXXXXX	0
105	OTHER			0
106	TOTAL USER COUNTS	0	0	0
107				

109	##########			
110	APPENDIX B - SECTION 3			
111	CURRENT PART 36 RULES			
112				
113	-PART 32 ACCOUNTS (1988 DATA)-			
114	(USE ANNUALIZED DATA - MULTIPLY A REPRESENTATIVE MONTH BY 12. IF			
115	MONTHLY DATA IS NOT AVAILABLE, ANNUALIZE THE MOST CURRENT QUARTERLY			
116	OR SEMI-ANNUAL DATA. USE MOST CURRENT DATA AVAILABLE).			
117				
118	MO. & YR. OR PERIOD USED TO ANNUALIZE DATA			
119				
120	EXISTING CATEGORIES IN ACCT. 6620-SERVICES			
121	----------			
122		ACCOUNT 662-REV. ACCOUNTING EXP.		
123	CATEGORY	STATE	INTERSTATE	TOTAL
124	----------	----------	----------	----------
125	TOLL TICKET PROCESSING EXPENSE			0
126	LOCAL MESSAGE PROCESSING EXPENSE		XXXXXXX	0
127	MESSAGE PROCESSING EXPENSE	0	0	0
128	OTHER BILLING AND COLLECTING EXPENSE			0
129	CARRIER ACCESS CHG BILLING & COLLECTING EXP			0
130	TOTAL-ACCT 6620-SERVICES	0	0	0
131				
132	REV ACCTG EXP IND & O/H EXP			0

133	(RELIEF AND PENSONS, RENT, OR ANY OTHER			
134	ITEMS NOT INCLUDED IN ABOVE EXPENSES)			
135				
136	REV ACCTG PLANT O/H & RETURN	_____	_____	
137	(NET RETURN=PLANT LESS RESERVES TIMES RATE			
138	OF RETURN PLUS ADJUSTMENT FOR IDC & ITC,			
139	IF APPLICABLE. THIS IS THE NET RETURN ON			
140	ANY PLANT WHICH WOULD BE ASSIGNED			
141	INDIRECTLY BY PART 36 AS A RESULT OF THE			
142	REVENUE ACCOUNTING EXPENSE ALLOCATION).			
143				
144	OTHER OVERHEAD	_____	_____	
145	(FEDERAL AND STATE INCOME TAXES AND OTHER			
146	INDIRECT EXPENSES AND TAXES WHICH WOULD			
147	BE ALLOCATED INDIRECTLY BY PART 36 AS A			
148	RESULT OF THE REV ACCOUNTING EXPENSE			
149	ALLOCATION. USE STATUTORY TAX RATE FOR			
150	THE DATA SUBMITTED).			
151				
152	TOTAL COMPANY REVENUE REQUIREMENTS	0	0	
153		==========	==========	==========
154	PERCENTAGE CHANGE FROM PART 67	0.00%	0.00%	0.0
155		==========	==========	==========
156				
157				
158	USER COUNTS			
159	----------			
160	TOLL (ACTUAL USER COUNT)	_____	_____	
161	INTERSTATE PRIVATE LINE	_____	_____	
162	STATE PRIVATE LINE	_____	_____	
163	OTHER	_____	_____	
164	TOTAL USER COUNTS	0	0	
165				

167	##
168	APPENDIX B - SECTION 4
169	(USE TOTAL OF JAN. & FEB. 1988 DATA ONLY)
170	
171	ENTER ALL REVENUE ACCOUNTING EXPENSES THAT WOULD HAVE BEEN INCLUDED
172	IN ACCT 662, PART 31 (USOA). TO DETERMINE THESE EXPENSES USE THE
173	SAME METHODOLOGY THAT WAS USED TO PREPARE YOUR 1988 TARIFF FILING.

	CURRENT PART 32 ACCOUNTS WHERE EXPENSE NOW RESIDES	PORTION OF THESE ACCOUNTS THAT WOULD HAVE BEEN INCLUDED IN ACCOUNT 662 STATE	INTERSTATE	TOTAL
CLASS A ACCTS:	ACCOUNT 6121			0
	ACCOUNT 6123			0
	ACCOUNT 6124			0
	ACCOUNT 6711			0
	ACCOUNT 6721			0
	ACCOUNT 6724			0
	ACCOUNT 6728			0
* OTHER CLASS A ACCTS:	_____			0
	_____			0
	_____			0
CLASS A TOTALS.....		0	0	0
CLASS B ACCTS:	ACCOUNT 6110			0
	ACCOUNT 6710			0
	ACCOUNT 6720			0
* OTHER CLASS B ACCTS:	_____			0
	_____			0
	_____			0
CLASS B TOTALS.....		0	0	0

* IN A SEPARATE LETTER EXPLAIN THE NATURE OF THESE EXPENSES AND WHY THEY ARE CHARGED TO THESE ACCOUNTS.

FOOTNOTE SECTION:

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC.	File Nos. CSG-88-069-ML CSG-88-070-ML

Applications for Authority to
add 11.45-11.7 GHz Receive
Frequency Band to International
Earth Station Facilities at
Schaumburg, Illinois, and
Minneapolis, Minnesota, to
Provide INTELSAT Business Services (IBS)
and Related Digital Video Services

ORDER AND AUTHORIZATION

Adopted: August 29, 1988; Released: September 9, 1988

By the Chief, International Facilities Division:

1. On July 14, 1988, Overseas Telecommunications, Inc. (OTI) filed two applications requesting modification of the Commission's Orders and Authorizations released June 18, 1987 (File Nos. CSG-87-040-P/L and CSG-87-041-P/L). These Orders authorized OTI to construct 11/14 GHz earth stations at Schaumburg, Illinois, and Minneapolis, Minnesota, and to use the stations to provide IBS and related digital video services. The instant applications request authority to add the frequency band 11.45-11.7 GHz to their existing receive frequencies to provide IBS and related digital video services. The addition of the receive frequencies is considered a minor change to existing licensed facilities.

2. The previous Orders limited the receive frequency bands to 10.95-11.2 GHz. We will now add 11.45-11.7 GHz to those authorizations. All the other restrictions in the referenced Orders remain unchanged. The scope of operation of the stations will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorizations to the provision of IBS and those video services compatible with the stations' digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, OTI may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed stations as multipurpose earth stations would require determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

3. Upon consideration of the applications, we find that authorization of the additional receiving frequency bands is required by the public convenience and necessity.

4. Accordingly, IT IS ORDERED that applications File Nos. CSG-88-069-ML and CSG-88-070-ML ARE GRANTED, and OTI is authorized to use its 6.1 meter, 11/14 GHz INTELSAT Standard E-2 earth stations at Schaumburg, Illinois, and Minneapolis, Minnesota, with the receive frequency band 11.45-11.7 GHz to provide IBS and related digital video services.[1]

5. All terms and conditions of the Commission's referenced Orders and Authorizations released June 18, 1987, remain the same.

6. Special Temporary Authorities granted to OTI for these facilities on July 11, 1988, (TAO-1454 and TAO-1455) are hereby terminated.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FTC COMMUNICATIONS, INC. File No. I-S-P-88-003

Petition for Order Requiring Interconnection Pursuant to Section 201 of the Communications Act of 1934

ORDER

Adopted: August 29, 1988; Released: September 9, 1988

By the Chief, International Facilities Division:

1. On January 21, 1988 FTC Communications, Inc. (FTCC) petitioned the Commission for an order requiring any carrier that obtained Section 214 authority to establish a so-called "common gateway" to the Federal Republic of Germany to interconnect with other carriers at just and reasonable rates. US Sprint Communications Company opposed the petition. Subsequently, on March 30, 1988, FTCC petitioned for leave to withdraw its January 21, 1988 petition in light of the Bureau orders released March 3, 1988 in File Nos. I-T-C-88-015, I-T-C-88-046 and I-T-C-88-058.[1] FTCC states that the conditions set forth in the Bureau orders provide the basic protection FTCC had sought in its petition. We find, based on a review of the pleadings and the Bureau orders, that the public interest would be served by dismissing FTCC's petition.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291 (1987), that the FTCC petition for an interconnection order IS DISMISSED with prejudice and this proceeding, File No. I-S-P-88-003, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* 3 FCC Rcd 1479-91.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

EVANGEL COMMUNICATIONS, INC.	File No. BPCT-860410KN
ACHERNAR BROADCASTING COMPANY	File No. BPCT-860410KP
LINDSAY TELEVISION, INC.	File No. BPCT-860410KQ

For Construction Permit
for a New Television Station
Charlottesville, Virginia

Appearances

B. Jay Baraff, Lee J. Peltzman, and *Aaron Shainis*, on behalf of Evangel Communications, Inc.; *Margot Polivy*, on behalf of Achernar Broadcasting Company; *Gene A. Bechtel*, and *Shelly Sadowsky*, on behalf of Lindsay Television, Inc.; *Christopher J. Reynolds*, on behalf of the National Radio Astronomy Observatory; and *Linda Bocchi*, . on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 18, 1988; Released: August 26, 1988

PRELIMINARY STATEMENT

1. This proceeding involves mutually exclusive applications filed by Evangel Communications, Inc. (Evangel), Achernar Broadcasting Company (Achernar) and Lindsay Television, Inc. (Lindsay) for authority to construct and operate a new commercial television station on Channel 64 at Charlottesville, Virginia.[1]

2. By Hearing Designation Order, DA 86-201, 51 *Fed. Reg.* 44521 (December 10, 1986), the Chief, Video Services Division, designated the following issues against those applicants.[2]

> 1. To determine whether there is a reasonable possibility that operation by Achernar as proposed would result in objectionable interference to the conduct of radio astronomy activities by the National Radio Astronomy Observatory in the West Virginia "Quiet Zone."[3]
>
> 2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air
>
> 3. To determine with respect to each of the applicants, except Achernar, whether its proposal is consistent with Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rules.[4]
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

A prehearing conference was held on January 20, 1987. Hearing sessions on these issues were held on April 13, 14 and 15, 1987.

3. At the April 15, 1987 hearing session the following issues were added by the Presiding Judge:

> (a) To determine the facts and circumstances surrounding the preparation of Achernar's engineering exhibit (Achernar Exhibit 4); and
>
> (b) To determine whether Achernar intended to conceal facts and/or mislead the Commission concerning the extent of interference to the National Radio Astronomy Observatory facility at Green Bank, West Virginia resulting from the proposed operation of each of the applicants, and if so, the effect thereof on its basic qualifications.

Tr. 174 *et seq.* ; FCC 87M-868, released April 20, 1987. Hearing sessions on the added issues were held on June 16, 1987 and July 9, 1987 with an intervening conference held on June 30, 1987. A final hearing session concerning the comparative coverage aspect of the standard comparative issue was held on September 23, 1987, at the conclusion of which the record of the proceeding was closed. *See Order*, FCC 87M-2330, released September 25, 1987. Proposed findings of fact and conclusions of law were filed by the parties on October 9, 1987 and replies thereto were filed on October 23, 1987.

FINDINGS OF FACT

Comparative Issue

Evangel Ownership, Structure and Control

4. Evangel held itself out as a non-stock corporation in its application filed on April 6, 1986 (Tr. 422), in its Integration Statement filed in this proceeding on December 22, 1986, and in its direct case testimony, which was offered into evidence on April 13, 1987, but was rejected (Tr. 430). In response to questions from the Presiding Judge at the April 13, 1987 hearing session, counsel for Evangel represented that Evangel, at that time, did not have executed articles of incorporation, by-laws, written minutes of meetings during which officers or directors were elected, or any other writing describing or governing the relationship of the principals of Evangel (Tr. 40-43, 295-299). When a question was raised as to whether Evangel was in compliance with the requirements for incor-

poration under Virginia law, counsel for Evangel reported that the filing of articles of incorporation with the State of Virginia is required under Virginia law, and that Evangel had not filed its articles, but intended to do so during the course of the hearing (Tr. 422 *et seq.*, 572-573).

5. According to information supplied in Evangel's application, five individuals serve as officers and/or directors of Evangel. Charles K. Wright is President/Chairman and a member of the governing board with a 33% membershp; Charles A. Wright and Robert W. Hutchinson are Directors, each with a 33% membership. Betty S. Wright is Treasurer and Elizabeth Dowdy is Secretary (Tr. 429-430).

Integration

6. Charles A. Wright proposes to serve full-time (a minimum of 40 hours per week) as the General Manager of Evangel's television station (Evangel Ex. 2). Charles A. Wright is a resident of Roanoke, Virginia. He proposes to relocate to Charlottesville if Evangel's application is granted. Wright is currently employed as the Chief Engineer at Station WEFC(TV), a position he has held since January 1986. From June 1983 until January 1986, Wright was employed as a technical engineer for Sunshine Communications which programmed a channel on the Roanoke Valley cable system (Evangel Ex. 4).

7. Charles K. Wright proposes to serve part-time (a minimum of 20 hours per week) as Program Director of Evangel's station (Evangel Ex. 2). Charles K. Wright is a resident of Roanoke, Virginia. He does not propose to relocate to Charlottesville in the event Evangel's application is granted. From 1972 to 1979, Wright produced, wrote and broadcast a 30-minute daily radio program carried by Roanoke stations. From 1975 to 1980, he produced, wrote and broadcast a 30-minute weekly television program on Station WSLS, Roanoke. From 1978 to 1986, he was President and General Manager of Sunshine Communications, the above-referenced cable programmer. Since January 1986, Wright has served as General Manager of Station WEFC(TV), Roanoke, a position which he intends to maintain in the event Evangel's application is granted (Evangel Ex. 5).

8. Robert W. Hutchinson, Betty S. Wright and Elizabeth Dowdy do not propose to be integrated into the day-to-day management of Evangel's proposed station (Evangel Ex. 2).

Diversification

9. Evangel's principals have the following interests: Charles K. Wright, Betty Wright and Elizabeth Dowdy are principals of Vine & Branch, Inc., licensee of Station WEFC(TV), Roanoke, Virginia. Charles K. Wright is President and Director; Betty Wright is Secretary; Elizabeth Dowdy is Treasurer. As mentioned above, Charles K. Wright currently serves as the General Manager of Station WEFC(TV), a position which he does not intend to divest if Evangel's application is granted.[5] Charles A. Wright is the Chief Engineer of Station WEFC(TV), a position which he will divest if Evangel's application is granted. Charles A. Wright, under the name of AW Broadcasting, has an application for a new television station at Danville, Virginia pending at the Commission (Evangel Ex. 3).[6]

Achernar Structure, Ownership and Control

10. Achernar is a Virginia corporation with two classes of stock, voting and non-voting. The articles of incorporation were executed on May 14, 1986; a certificate of incorporation was issued by the State of Virginia on May 20, 1986 (Evangel Ex. 7; Tr. 314). Originally, Achernar was authorized to issue 500 shares of voting stock and 4500 shares of non-voting stock (Evangel Ex. 7). On May 20, 1986, Margot Polivy subscribed to purchase all 500 shares of voting stock at $5.00 per share and Marilyn Marcosson subscribed to purchase 500 shares of non-voting stock at $5.00 per shares. Each shareholder executed written stock subscription agreements which were prepared by Ms. Polivy (Evangel Ex. 10; Tr. 324, 334). Thereafter, on February 9, 1987, Ms. Polivy and Ms. Marcosson were issued stock certificates reflecting the issuance of 500 shares of voting stock to Ms. Polivy and 500 shares of non-voting stock to Ms. Marcosson (Evangel Ex. 9; Tr. 325). Based on this apparent 50/50 division of equity between the Achernar stockholders, Evangel filed a request to depose Ms. Marcosson in March 1987. Thereafter, Achernar undertook the amendment of its articles of incorporation to change the number of shares of authorized voting and non-voting stock. Upon the filing of an amendment to Achernar's articles of incorporation, effective April 2, 1987, Achernar's authorized voting stock now totals 4500 and its nonvoting stock totals 500 (Achernar Ex. 7). Ms. Polivy testified that Achernar's original stock authorization of 500 voting and 500 non-voting shares was in error, and that the error was not realized until Evangel's request to depose Ms. Marcosson was filed (Tr. 331).

11. Achernar adopted by-laws in March or April, 1986 (Evangel Ex. 8, Tr. 333). The by-laws provide that "each outstanding share regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders unless the articles of incorporation or law provide otherwise" (Evangel Ex. 8, p. 4). The by-laws also provide that Achernar can have up to five Directors (*Id., p. 5)*. And, with respect to the election of Directors, the by-laws expressly state that "in all elections for directors each outstanding share regardless of class is entitled to one vote *(Id.*, p. 4). In addition, the provisions in the by-laws relative to directors do not expressly prohibit a non-voting shareholder from being elected to the board of directors (*Id.*, pp. 5-6). Nor, is a non-voting shareholder prohibited from becoming an officer of the corporation (*Id.*, pp. 10-13).

12. Ms. Marcosson, the non-voting shareholder, has not participated in any formal activities of the corporation (Tr. 315). Her sole action on the corporation's behalf was a pre-filing introduction to an official of the Women's National Bank, the bank which provided Achernar with its loan commitment. Ms. Marcosson is not required to guarantee the loan (Tr. 315-316, 325-327).

Integration

13. Margot Polivy proposes to serve full-time as the General Manager of Achernar's television station (Achernar Ex. II). Ms. Polivy is a resident of Washington, D.C. (Tr. 309, 312-313). She is a practicing attorney and a partner of the law firm, Renouf & Polivy, which specializes in the area of communications law. Ms. Polivy does not claim broadcast experience (Achernar Ex. II; Tr. 309). To effectuate her integration proposal, Ms. Polivy proposes to relinquish her law practice (Tr. 311-312). She further proposes to move her residence to a farm which

she owns in Albermarle County, Virginia, located within the service area of the proposed television station (Tr. 311). Ms. Polivy claims credit for week-end and vacation residence at her Albemarle County farm since March 1972 (Achernar Ex. II; Tr. 312). She does not seek credit for participation in community or civic activities in the Charlottesville area (Achernar Ex. II).

Diversification

14. Neither Achernar nor its principals have any interest in any medium of mass communications (Archernar Ex. III).

Lindsay

Structure, Ownership and Control

15. Lindsay was incorporated under the laws of the Commonwealth of Virginia on May 20, 1986. The corporation is authorized to issue 1000 shares of common voting stock, all of which have been subscribed for by George Walton Lindsay, the sole director and officer (President, Secretary, and Treasurer) of Lindsay (Lindsay Ex. 1).

Integration

16. Lindsay's sole principal, George Walton Lindsay will serve full-time (a minimum of 40 hours per week) as the general manager of Lindsay's television station. In that capacity Lindsay will set station policies and oversee the day-to-day operation of the station. All station department heads will report to him. Lindsay will also oversee the implementation of EEO policies in the station's hiring practices (Lindsay Ex. 2, p. 6).

17. Lindsay was born in Richmond, Virginia in 1930 and has resided in Charlottesville, Virginia virtually all of his life. He has a Bachelor of Science degree from Hampden-Sydney College, Hampden-Sydney, Virginia, and a Masters degree in Business Administration from the Darden Graduate School of Business, the University of Virginia at Charlottesville. From 1956 to 1961, Lindsay was employed by *The Daily Progress*, Charlottesville's daily newspaper which was founded by his grandfather. He left the newspaper to attend graduate school and upon obtaining his M.B.A., relocated to North Carolina for approximately four years where he worked for *The Charlotte Observer* and later, *The Lexington Dispatch*. In 1967 he returned to Charlottesville to serve as the Production Manager of *The Daily Progress*, and became a Vice President of the company. When the newspaper was sold in 1971, he became a marketing officer of a Charlottesville bank until 1973. He terminated that employment to devote more time to Williams Newspapers Features Syndicate, proprietorship which he purchased in 1973. In 1976, he purchased a similar business, Keister Advertising Services, and consolidated the two companies into Keister-Williams Newspaper Services, Inc. (K-W).

18. Lindsay is President and sole stockholder of K-W which provides illustrated features to approximately 750 newspapers around the country for inclusion in the newspapers' weekly religious sections and assists approximately one-half of those newspapers in selling business sponsors for the religious page on which the K-W feature appears (Tr. 456-458, 530, 547). In addition, K-W, through Lindsay Publishing (a division of K-W), owns two weekly newspapers published in North Carolina (further described at 22-23 *infra)* (Tr. 540-541). Lindsay currently spends most of his working hours on K-W business; he intends to relinquish his day-to-day activities with K-W in order to devote full-time to the management of the television station (Tr. 535-536; Lindsay Ex. 2, pp. 6-7). Lindsay testified that K-W can currently function without his involvement in its day-to-day affairs (Tr. 470-471). He expects to continue to devote no more than ten hours per week to oversight of K-W. In addition, he intends to continue to devote approximately two to four hours per week to the North Carolina newspapers which are managed on a day-to day basis by his son (Tr. 536, 555-556).

19. Lindsay's participation in civic organizations and community activities in Charlottesville has included the following activities:

member of the Charlottesville Rotary Club from 1968-1978, during which time he served on various committees, as Secretary for one year and as President from 1975 to 1976. He renewed his membership in the Rotary Club in March 1987 (Lindsay Ex. 2, p. 7; Tr. 561).

current Director (since 1969) of the Cancer Society of Charlottesville. He regularly attends quarterly meetings of the Board of Directors and special meetings. He chaired a committee which interviewed prospective Directors, served as the Treasurer of the Cancer Society (1971 thru 1973), during which time he kept its books, and served as head of the Cancer Society's Business Group. As a result of his active participation, Lindsay became one of two life members of the Cancer Society in 1986 (Lindsay Ex. 2, p. 8; Tr. 562- 564).52

member of the Board of Directors of the Civic League of Charlottesville and Albemarle (1972-1975), an organization which sponsored projects such as park beautification, town banquets and monitoring of local government agencies (Lindsay Ex. 2, p. 7).

current member (since 1967) of Westminister Presbyterian Church in Charlottesville for which he served on the Board of Deacons and was Stewardship Chairman in 1973. In that position, Lindsay was in charge of fund-raising efforts and programs to meet the Church's next-year budget (Lindsay Ex. 2; Tr. 562).

member of the Board of Directors of Family Services, Inc., Charlottesville (1972-1973), a non-profit service organization which provides psychological counseling to individuals and families in the Charlottesville area, charging on a sliding scale according to income. Lindsay attended regular monthly meetings of the Board and attended additional meetings to interview candidates for the position of Director (Lindsay Ex. 2, p. 8; Tr. 566).

member of the Charlottesville Board of ESSA (Education Special Services Administration) (1972-1973), a federally-funded organization which aided children with behavioral problems by hiring tutors to provide one-on-one attention (Lindsay Ex. 2, p. 8; Tr. 566).

active supporter of one of Charlottesville's primary institutions, the University of Virginia at Charlottesville. Since 1983 he has served as the Secretary of

the Class of 1963 of the Darden School of Business of the University of Virginia. In that capacity he obtains information concerning his fellow alumni for inclusion in the Business School's quarterly publication and participates in telethons. He has also been a member of the University of Virginia Student Aid Foundation since 1957. The Foundation raises money for student athletic scholarships and Lindsay participates in the organization's special fund raising events (Lindsay Ex. 2, p. 8; Tr. 564-565, 567-658, 571-572).

host of two fund-raisers held at his home (1986-87) one for the University of Virginia and Community Symphony Group and the other for the local unit of Innesfree, an organization which helps handicapped children (Lindsay Ex. 2, p. 8; Tr. 568-569).

Diversification

20. As previously mentioned, K-W produces religious features which are marketed to approximately 750 newspapers in 40 states for placement on the weekly religious page. K-W provides the features to the newspapers in quarterly installments; they are prepared well in advance of the date of publication. K-W also assists approximately one-half of its newspaper clients in selling business sponsors for the religious page of theidr newspapers (Tr. 456-458, 529-530, 547). The feature is currently sold to *The Daily Progress*. It is also sold to a weekly newspaper in Warrenton, Virginia, and to a newspaper in Harrisonburg, Virginia (Tr. 452, 454-456). The feature includes an illustration and text which carries a general, inspirational, non-denominational message. The text does not contain references to current events other than national holidays, nor does it contain references to specific communities, such as Charlottesville or the proposed service area, or any specific religious institution located within Charlottesville or the proposed service area (Tr. 459-460, 519-520). Neither Lindsay nor K-W has any editorial control over any newspaper's use of the features provided by K-W. Neither Lindsay nor K-W has ultimate control over the amount of space that any newspaper will devote to the feature (Lindsay Ex. 2, p. 3).

21. Neither Lindsay nor its sole principal, George Walton Lindsay, nor any member of Mr. Lindsay's immediate family, has any interest of any kind in a daily newspaper, or any medium of mass communications licensed by the Federal Communications Commission. *Id.*

22. A division of K-W, Lindsay Publishing Company, owns two weekly newspapers in North Carolina, *The Yadkin Enterprise* and the *King Times - News*. George Walton Lindsay does not have an active role in the day-to-day management of either *The Yadkin Enterprise* or the *King Times - News*. Lindsay's adult son, Clark Lindsay, is the publisher of each newspaper, and in that position, is responsible for the day-to-day management of the papers. *The Yadkin Enterprise* is a free newspaper with a circulation of 12,000 to 16,000, primarily in Yadkin County (population 28,439) and the community of Elkin, which is located adjacent to Yadkin County in the northwestern part of North Carolina. *The Yadkin Enterprise* has a home office in Booneville (population 1,028), located in Yadkin County. Booneville is located approximately 240 miles from Charlottesville and outside the Grade B contour of Lindsay's proposed television station. *The Yadkin Enterprise* is not circulated in Charlottesville or within the proposed service area of Lindsay's station (*Id.*, pp. 3-4).

23. The *King Times - News* is a weekly newspaper with a paid circulation of 3,900 in Stokes County (population 33,068) and 600 in adjacent Forsythe County (population 131,885), North Carolina. Its home office is in King, North Carolina (population 4,000). King is located approximately 212 miles from Charlottesville and outside the Grade B contour of Lindsay's proposed station. The *King Times - News* is not circulated in Charlottesville or within the proposed service area of Lindsay's station (*Id.*, pp. 4-5).

24. Both of the weekly newspapers owned by Keister-Williams compete with other media voices in their respective areas of circulation. *The Yadkin Enterprise* has competition from *The Yadkin Ripple* (weekly publication; circulation 5,900), *The Elkin Tribune* (published three times per week; circulation 5,670) and the *Winston - Salem Journal* (published daily and circulated in Yadkin County and Elkin). In addition, Radio Stations WJOS(AM) and WIFM-FM are licensed to Elkin, and Station WYDK(AM) is licensed to Yadkinville, located in Yadkin County. The *King Times - News* has competition from the Danbury Reporter (weekly publication, circulation 5,093) and two dailies, the *Winston - Salem Journal* (circulation 3,500 in King) and the *Greensboro News and Record* (estimated circulation in Stokes County, 1,000). The communities of Booneville, Elkin and King receive television service from three television stations licensed to Greensboro, two television stations licensed to Winston-Salem and one television station licensed to High Point, North Carolina. In addition, Booneville and other localities in Yadkin County and Elkin are served by cable systems. Stokes County, including King, is also served by cable (*Id.*, pp. 4-5).

25. Charlottesville, Virginia (population 45,010) is served by the following media voices: Five daily newspapers (*The Daily Progress*, circulation 31,530; *The Cavalier Daily*, a free publication published by the students of the University of Virginia; The *Richmond Times - Dispatch*, *The Richmond News Leader* and *The Washington Post)* ; a weekly newspaper (*The Charlottesville Observer*, total circulation 4,004). In addition, there are three AM radio stations, three commercial FM radio stations, one noncommercial FM radio station and one commercial television station licensed to Charlottesville. Also, a cable television system serving Charlottesville and Albemarle County carries six television stations from the Virginia communities of Harrisonburg, Richmond, Petersburg and Staunton, three stations from Washington, D.C., and a "superstation" from Atlanta, Georgia. *Id.*, p. 6. Finally, according to a map showing other commercial television services available in the Grade B contours of the Charlottesville applicants, it appears that there are at least three television stations licensed to communities other than Charlottesville which currently provide over-the-air service to Charlottesville: Stations WXEX-TV, Petersburg; WTVR, Richmond; and WWBT, Richmond (Joint Engineering Ex., Figure 2, p. 12).

Comparative Coverage

26. None of the three applicants proposes to serve any areas or populations which are currently unserved by any other commercial television service (Jt. Eng. Ex., p. 11). Each of the three applicants proposes to serve some non-common "gray" area, that is, area where one other television service is currently available (*Id.*, p. 12). The non-common gray area and population coverage figures for each applicant are as follows:

Applicant	Area (sq. mileage)	Population
Achernar	702.5	15,244
Lindsay	160.2	3,908
Evangel	17.3	871

(Lindsay Ex. 3B, p. 4).

27. The applicants' area and population coverage figures where two or more other television services are currently available area as follows:

No. of Other	Achernar		Lindsay		Evangel	
TV Services	Area	Pop.	Area	Pop.	Area	Pop.
2	239.7	9,279	19.2	562	93.7	3,986
3	435.3	21,198	45.4	1,375	249.5	16,659
4	274.3	7,123	12.3	379	126.2	1,300
5 or more	3,456.2	252,464	335.8	19,185	1,484.3	52,723

(Jt. Eng. Ex., p. 11).

28. Achernar is able to claim gray area coverage northwest of Charlottesville for the following reasons: 1) Its proposed transmitter site is located inside the boundaries of the Quiet Zone which was established to protect the operations of the NRAO from harmful interference (*See infra)* ; 2) It proposes to operate with an omnidirectional antenna and effective radiated power of 3182 kW (Lindsay Ex. 3, pp. 4-5). Had Achernar chosen to modify its proposed operation to comply with the NRAO-established power limits in the direction of the Green Bank, West Virginia facility, it would serve no non- common gray area. *Id.*, pp. 4-5, Figure 1A. A third, critical factor contributing to Achernar's ability to claim northwestern gray area coverage is the fact that since the establishment of the Quiet Zone in 1958, other applicants for authority to construct television stations in Charlottesville -- including the other applicants in this proceeding -- have located their transmitters outside the Eastern boundary of the Quiet Zone (Tr. 116-117). In the single instance where a television station licensed to a nearby community has located its transmitter inside the Quiet Zone -- Station WVPT, Channel 51, Staunton, Virginia -- that station has cooperated with the Observatory to operate with a special antenna that was specifically designed for the purpose of suppressing radiation in the direction of the Green Bank facility (Tr. 118- 119). If Achernar were to operate from its proposed transmitter site with such an antenna designed to protect Green Bank from interference, Achernar would serve no non-common gray area (Lindsay Ex. 3, p. 5, Figure 1B).

Qualification Issues

Air Hazard Issue

29. *Lindsay*. The air hazard issue relative to Lindsay was deleted by *Order*, FCC 87M-162, released January 23, 1987.

30. *Achernar*. The Federal Aviation Administrative issued a Determination of No Hazard to Air Navigation with respect to Achernar's proposal, dated July 1, 1987 (Achernar Ex. 17).

31. *Evangel*. Evangel, to date, has not received FAA approval of its proposed tower site (Evangel Ex. 6).

Quiet Zone Issue Re: Achernar

32. The National Radio Astronomy Observatory (NRAO) with headquarters in Charlottesville, Virginia, was established by the National Science Foundation (NSF) in 1957 to operate three radio astronomy observatories located in Green Bank, West Virginia; on the Plains of San Agustin near Socorro, New Mexico; and on Kitt Peak near Tucson, Arizona. Two large radio telescopes, a 300-foot diameter meridian transmit telescope and a 140-foot diameter fully steerable telescope, are located in Green Bank, and are used to observe cosmic signals over the frequency range of 25 MHz to 25 GHz (Tr. 104). In addition, a four-element (Tr. 91) interferometer is operated there for the U.S. Naval Observatory for purposes of time-keeping (Tr. 110). Analogous to light sensitivities of optical astronomy telescopes, radio astronomy telescopes must be protected from local, man-made sources of interference because cosmic signals are very weak (Tr. 106). It has been estimated that all the radio power collected by all the radio telescopes on earth since radio waves from space were discovered in 1932 would not suffice to light a single light bulb (NRAO Ex. 1, p. 1).

33. The NRAO is operated by Associated Universities, Inc. (AUI), a nonprofit research management corporation established in 1946 under the sponsorship of nine universities: Columbia, Cornell, Harvard, Johns Hopkins, Massachusetts Institute of Technology, Pennsylvania, Princeton, Rochester and Yale. Under the terms of its contract with the NSF, AUI provides a staff to manage and to operate and maintain the facilities of NRAO; provides scientific and other support in the conduct of research programs in radio astronomy and related fields; maintains research programs to promote advances in and the utilization of knowledge in astronomy; and engages in educational programs in radio astronomy and related fields (NRAO Ex. 1, p. 2).

34. The principal responsibility of the NRAO is to provide the astronomy community access to the most sophisticated research tools through the development of major national facilities which universities and research organizations do not have the resources to build or maintain. NRAO facilities are available for use by universities and institutions of higher learning, other observatories, government laboratories and private industry, as well as by NRAO's own staff. In 1985, approximately 650 researchers from 155 universities, research organizations and observatories from all over the world used NRAO's facilities. Because of the competition for use of NRAO's radio telescopes, research proposals and other requests for telescope time are referred to independent referees; time is awarded and allocated on the basis of proposals which are likely to advance the science of astronomy. Radio astronomy observations are conducted at Green Bank almost 24 hours of every day, almost 365 days of every year (NRAO Ex. 1, pp. 2-3; Tr. 107-114).

35. To study cosmic signals, radio astronomers must use sophisticated, state-of-the-art electronic equipment and the prevention of interfering noise is of paramount significance. One method of improving the sensitivity of a radio astronomy telescope and receiver is to minimize the system temperature. At the time the NRAO was first established thirty years ago, a good telescope-receiver for frequencies between 1 and 2 GHz had a system temperature of several hundreds, perhaps even a thousand, degrees. Today, the temperature has been reduced to only twenty degrees. This improvement in sensitivity, however,

results in weaker interfering signals becoming more noticeable. Man-made signals that previously had been masked behind the "noise" generated within the telescope's electronics have become more prominent. In addition, the general level of electromagnetic activity worldwide has increased (NRAO Ex. 1, p. 3). In addition to the limitations placed by a West Virginia statute on use of electrical equipment in and around the NRQZ, NRAO takes precautions to reduce the noise levels even further by not permitting the use of microwave ovens or any vehicles other than those powered by diesel engines, by screening rooms which contain electronics to prevent radiation leakage, by repairing electric blankets, electric fences and by restricting the use of two-way radios (Tr. 106-107).

36. The detection of weak signals is important in radio astronomy because distant regions of space and early moments in time can be probed. The most distant objects in space will usually produce the weakest signals on the earth. As the distance from earth is doubled, the signal received diminishes to one-fourth of its previous value. Furthermore, the signals from distant objects travel farther to reach the earth and therefore contain older information. To use an example, the sun's rays that warm us leave the sun eight minutes before we feel them. The sun is considered to be in earth's immediate proximity; radio astronomers study signals today that began their journey ten billion years ago from objects which are more than ten billion light years distant (every light-year equals approximately six trillion miles (NRAO Ex. 1, p. 4).

37. Detection of weak signals also permits analysis of small and sparse concentrations of matter. The space between the stars is filled with clouds of gases, some of which are specific atoms or molelcules which transmit radio frequency signals. The strength of the signal depends on how many molecules lie in the beam of a telescope. If a radio astronomer can detect very weak signals, tenuous collections of interstellar matter can be studied. Because these signals represent an extreme among all the concentrations present, they are important (NRAO Ex. 1, pp. 4-5).

38. It is important to keep the full range of frequencies available for NRAO's use, and as free from interference as possible, because radio astronomers study two main types of radiation: broad and narrow band. Narrowband are those signals which exist only in the immediate vicinity of a certain frequency. Hydrogen, for example, which is the most abundant chemical element in the universe, radiates at 1420.4056 MHz. If, however, the object containing the hydrogen is moving away from the earth, its signals are "Doppler shifted" to lower frequencies. Astronomers have studied hydrogen signals from other galaxies over the whole range of 450 to 1420 MHz (NRAO Ex. 1, p. 5).

39. Many other molecules and atoms radiate narrowband signals. At NRAO's facilities in Green Bank, carbon atoms have been studied at 26 MHz and ammonia molecules have been studied at 25 GHz (Tr. 162). Many other transitions occur throughout the spectrum in between. As science and technology advance, frequencies never before used in radio astronomy become scientifically significant because chemists discover new atomic and molecular transitions and because better receivers permit detection of weaker signals. This year, for example, chemists from Arizona State University, The Harvard- Smithsonian Center for Astrophysics and Oxford University (England) have measured signals from a species of molecule at frequencies which had not been used by radio astronomers at NRAO since its inception 30 years ago. These frequencies are used in some satellite communications and the search for this molecular matter at NRAO's facilities will be extremely difficult (NRAO Ex. 1, pp. 5-6; Tr. 163).

40. The broadband signals studied by radio astronomers differ from narrowband in that the strength of the signal is comparable at adjacent frequencies. Limited retuning to avoid an interfering signal occurring at a particular frequency is not always acceptable because it would interfere with a common method of improving the sensitivity of a receiver: to increase the bandwidth (Tr. 185-187). Every increase by a factor of four in the total band of frequencies received results in improved sensitivity by a factor of two. Every such increase means a standard object can be detected at a forty percent greater distance, which almost triples the volume of space available to study. Interference occurring at many different frequencies renders the ability to widen receiver bandwidths difficult, if not futile (NRAO Ex. 1, p. 6). Use of 560-566 MHz is foreclosed to NRAO because it is being used by Channel 29 in Charlottesville; use of 692-698 MHz is not precluded because Channel 51 in Staunton was able to directionalize its antenna to eliminate objectionable interference at Green Bank (Tr. 114-120). The FM band is "very hard" to use because of the number of stations in close proximity to the NRQZ (Tr. 124). Moreover, Dr. George Seielstad, the Assistant Director for Green Bank operations of the NRAO, testified that he was aware that the 770-776 MHz, the frequencies on which the permittee of Channel 64 in Charlottesville will operate, has been used in studies previously conducted at the Observatory (Tr. 146).

41. In astronomy events occur at times that are not always predictable. For example, a star may explode as a supernova, a galaxy may flare in brightness or a distant object may be occulted by a nearer one. When these phenomena occur, they are of great interest to astronomers and can be studied only at the time of occurrence. The uncertainty of predicting the occurrence of these events makes it impossible to determine in advance which frequencies will be most useful at which time. It is, thus, critically important that the spectrum within the NRQZ be kept as free from sources of interference as possible (NRAO Ex. 1, p. 7).

42. The needs of radio astronomy have directly or indirectly fostered technological innovations with applicability beyond radio astronomy, such as other scientific disciplines, defense and private industry, most notably telecommunications. This is because the continuous need for technological innovation and implementation has driven radio astronomers to develop the highest gain antennas, the most sensitive receivers and the most accurate, efficient and reliable instrumentation that defines the state of the art in signal reception and analysis (NRAO Ex. 1, pp. 7-8).

43. Developments fostered by radio astronomy technology find application today in such areas as antenna design for high frequencies used in commercial and military satellite communications, high efficiency antenna feeds, low noise receivers, amplifiers, transistors, cooling mixers (used primarily by the defense industry for battlefield radar systems, etc.), very wideband oscillators, cryogenic refrigeration (used by the semiconductor industry) and such medical techniques as x-ray tomography of human tissue and microwave themography which is used to detect breast cancer (NRAO Ex. 1, p. 8).

44. An NRAO employee, Ray Escoffier, recently invented a high performance recorder to meet enormous data storage requirements. The recorder is being developed commercially for archiving scientific and business data and medical electronics (NRAO Ex. 1, p. 8).

45. The National Radio Quiet Zone (Quiet Zone) is a fixed 13,000 square mile area of Virginia and West Virginia which surrounds the NRAO at Green Bank, West Virginia. The Quiet zone was established by Commission Rule Making in 1958 to provide interference protection to radio astronomy operations of the NRAO at Green Bank, West Virginia. Applicants for FCC authority to construct and operate, or for major modification of, any fixed radio transmitter within the area bounded by 39^0 15' N on the north, 78^0 30' W on the east, 37^0 30' N on the south, and 80^0 30' W on the west, are required to notify the NRAO, which is in turn permitted to review the application proposal and to comment and object to the application (NRAO Ex. 2, p. 1).

46. The NRAO's comments and objections to the FCC are based on the power level that the proposed transmitter is expected to produce at the focal point of the 43-meter telescope near Green Bank. This power level is predicted from the effective radiated power from the proposed transmitter, standard propagation equations published by the National Bureau of Standards (Technical Note 101), and the detailed topography between the transmitter and the 43-meter telescope. Because of varying propagation conditions, the predictions specify average expected power and not exactly what would be measured at a specific instant. Since the predictions are based on empirically verified propagation models, they provide the best forecast of the power levels to be expected (NRAO Ex. 2, pp. 1-2).

47. The NRAO has established power density limits which, if exceeded by new or modified transmitters in the NRQZ, will result in significant degradation in the interference environment for radio astronomy observations at Green Bank. These limits were established by taking into consideration demonstrable receiver sensitivities and standards for antenna sidelobe responses (CCIR Report 224-5), the proximity of the transmitter's radio frequency to a protected radio astronomy band, and existing interference conditions over which the Quiet Zone has no control, such as the radiation propagated into the Quiet Zone by the ionosphere (NRAO Ex. 2, p. 2; Tr. 191).

48. NRAO has established and published documents which give the power density limits for all frequencies that would affect observations at Green Bank. Any radiation in a frequency band in which radio astronomy is the sole primary service is considered harmful. In other radio astronomy bands and in small bands immediately adjacent to all radio astronomy bands, the limit is set to the CCIR Report 224-4 level. At all other frequencies the limits depend on the existing environment and are from 10 to 90 dB higher than the CCIR Report 224-4 levels (NRAO Ex. 2, pp. 2-3 and Attachments A, B and C; Tr. 192-211). NRAO has made exceptions and has permitted operations which exceed its power density limits in the cases of radio use for public health and safety purposes (Tr. 167), other agencies of the government including the U.S. Air Force, (Tr. 178-179, 182-183, 189-190), and works with broadcast applicants to fashion an application which will not cause objectionable interference to the Quiet Zone (Tr. 168).

49. NRAO has also published a fact sheet which is available to all applicants for authority to construct new or modified transmitters within the NRQZ. On the reverse side is a map showing the boundaries of the Quiet Zone. In order to perform a propagation analysis of an application and to determine the maximum allowable effective radiated power (ERP) that a radio transmitter inside the NRQZ may have in compliance with the NRAO limits, the following information is required:

1. Antenna location in latitude and longitude to the nearest second;
2. Antenna site ground elevation above mean sea level (AMSL);
3. Antenna (radiation center) height above ground level (AGL); and
4. Frequency or frequency range of each transmitter

(NRAO Ex. 2, pp. 3-4 and Attachment D).

50. When this information is received, the coordinates are plotted on a U.S. Geological Survey 7.5 minute series topographic map in order to verify the accuracy of the reported ground elevation and antenna location. The data are then entered into a computer program entitled "QZPGM" which is based on the National Bureau of Standards Technical Note 101. The "QZPGM" program computes the following parameters:

1. True azimuth bearing from receiver (NRAO) to transmitter;
2. True azimuth bearing from transmitter to receiver;
3. Distance between transmitter and receiver;
4. Receiver and transmitter site elevations; and
5. Elevation, radius and distance of obstacles in the radio signal path from the transmitter to the receiver.

The distances and elevations are obtained from a digitized topographic map of the NRQZ (NRAO Ex. 2, p. 4).

51. After these parameters are computed, the "QZPGM" program calculates the total diffraction attenuation, troposcatter attenuation and free space attenuation for the specified frequency, to determine a total path attenuation. With the total path attenuation, frequency and NRAO limit for received signal power density, the "QZPGM" program computes the maximum allowable ERP relative to a dipole on a true azimuth bearing from the transmitter to the receiver reference point at NRAO, Green Bank (NRAO Ex. 2, pp. 4-5).

52. On April 24, 1986, the NRAO objected to the application of Achernar Broadcasting Company for a construction permit for a new television broadcast station on Channel 64 in Charlottesville, Virginia, File No. BPCT-860410KO "unless and until it complies with Section 73.1030 of the Commission's rules by forwarding a copy of the engineering portion of its application to NRAO for analysis and comment." By letter dated April 19, Achernar wrote NRAO and enclosed a copy of the appropriate engineering protions of its application (NRAO Ex. 2, p. 5 and Attachments E and F).

53. Paragraph 3 of Section V-C of Achernar's application (Attachment F hereto) shows that it proposes a maximum visual ERP of 3182 kilowatts. This level exceeds

NRAO's limits by a multiplication factor of 31,820 and would therefore cause objectionable interference (NRAO Ex. 2, p. 8; Tr. 166)

54. After analyzing Achernar's application in accordance with the procedures outlined above, the NRAO notified the Commission by letter dated May 5, 1986, that it objected to Achernar's application "because the computed power density [limits] at NRAO's operations at Green Bank, WV, . . . [would] be exceeded." NRAO will withdraw its objection if the application is modified so that the transmitter power and antenna radiation pattern limit the ERP dipole to 100.0 watts toward Green Bank at 295.2^0 true azimuth bearing." (NRAO Ex. 2, pp. 5-6 and Attachment G).

55. Achernar chose to remain at its proposed transmitter site in the Quiet Zone without modifying its proposal in any way. In addition, Achernar tendered no facts in the record disputing NRAO's assertion that Achernar's proposed operation would produce objectionable interference to NRAO's Green Bank operations. *See* Achernar Ex. IV.

Achernar Mispresentation Issue

56. This issue seeks to determine whether Achernar intended to conceal facts and/or mislead the Commission concerning the extent of interference to the NRAO facility at Green Bank, West Virginia resulting from the proposed operation of each of the applicants. The basis for the issue is statements made in the engineering exhibit prepared for Achernar by John J. Mullaney (Achernar Ex. 4).

57. Achernar offered into evidence an engineering exhibit (Achernar Ex. 4) which sought to justify the location of Achernar's transmitter site within the Quiet Zone. One of the chief arguments made by Achernar in its exhibit concerned the relative interference caused to the NRAO facilities by the different applicant's engineering proposals. Achernar, through its engineer, John J. Mullaney, declared under penalty of perjury that the NRAO had "opposed the Achernar proposal despite the fact that the two other pending proposals for Charlottesville [would] create the same amount (if not more) of noise or interference to their measurement" (Achernar Ex. 4, p. 5). At a different point in the exhibit, Achernar stated that the "potential interference from the Achernar proposal was over *40 percent below* the two other proposals . . . " (Achernar Ex. 4, p. 6) (emphasis in original).

58. Both of these statements were false and misleading. Not only did Lindsay's proposal not create *more* interference than Achernar, as claimed by Achernar in its exhibit, but, as acknowledged by Mullaney under cross- examination, Lindsay's signal was only one-third as strong as Achernar's over the NRAO facility (Tr. 392). Additionally, as Mullaney admitted, again under cross-examination, Achernar's declaration as to the potential interference of the proposals was "not a correct statement" (Tr. 396).

59. The foregoing errors surfaced in the following manner: Mullaney appeared for cross-examination on the engineering direct case without bringing the underlying data and studies to support the written exhibit material (Tr. 88-89). Mullaney's testimony was halted and deferred until the following day, April 14, 1987, allowing time for him to bring those materials to the hearing room and also furnish them to opposing parties (Tr. 291). Overnight Mullaney discovered the computational error in his terrain studies referred to above (Tr. 611). In a cover sheet to the underlying data tendered as Achernar Ex. 6, Achernar provided corrected computations showing the 4.5 DB differentiation between Achernar and Lindsay (Tr. 614). However, Achernar did not then disclose this to be a correction, or make any reference to its impact on the accuracy of the statement in the engineering direct case exhibit (Tr. 615). The significance of the corrected calculation and its impact on the accuracy of the direct case exhibit surfaced in cross-examination of the witness by counsel and questioning by the Court (Tr. 391-393).

60. Under cross examination on April 17, Mullaney claimed that the sentence concerning relative interference was "speaking figuratively as opposed to in exact quantities . . ., " (Tr. 392). In this regard, Mullaney stated his intention was to convey that all three proposal created unacceptable interference to the NRAO, regardless of the level of interference. He asserted it was not his intention to mislead the reader (Tr. 392, 395).

61. At the hearing held on June 16, 1987 (following the addition of the misrepresentation issue), Mullaney stated that Achernar Ex. 4 contained two discrepancies which needed to be corrected. First, Mullaney sought to revise the language in dispute in Achernar Exhibit 4, page 5, to read that "the other two pending proposals for Charlottesville will create noise or interference to the Greenbank facility thousands of times in excess of what Greenbank claims to be tolerable." Second, Mullaney proposed to change the language in dispute on page 6 of the same exhibit to read "ERP" instead of "potential interference" (Tr. 606).

62. With respect to the first discrepancy, Mullaney asserted that the statement resulted from a mathematical error in his calculations (Tr. 607, 610). According to Mullaney, he discovered the computational error in his terrain studies on the evening of April 13, 1986 after Achernar's exhibit had been identified, but prior to his April 14 testimony sponsoring Achernar Exhibit 4 (Tr. 611, 650-651, 669). In making his calculations, Mullaney failed to include pi in one of the calculations (Tr. 610-611). Under the corrected calculations, Achernar operating with 3,182 kilowatts and taking into account the terrain of its signal path would create three times as much interference to the NRAO facility as Lindsay operating with 500 kilowatts taking into account the terrain of its signal path (Tr. 392).[7]

63. At the time he prepared Achernar's engineering exhibit, Mullaney had in his possession a letter from consultant Phil Rice showing a difference in terrain attenuation over paths of the signals of Achernar and Lindsay (Tr. 640-641). Rice, author of Tech Note 101,[8] was commissioned by Achernar to determine if the intervening terrain would sufficiently attenuate the impact of its signal (operating with 100 watts) to achieve the desired interference level at the NRAO location (Tr. 637-638). Achernar's hope was that this study would show the terrain attenuation to be sufficient to allow greater power than 100 watts while maintaining the NRAO's desired level of protection (Tr. 637-638). However, the study showed that the intervening terrain on the path from Achernar's proposed site was not sufficient to cause attenuation supporting even 100 watts (Lindsay Ex. 7; Tr. 638). Rice reported the results of his study by phone and also by confirming letter to Achernar (Tr. 639-640, 685-686; Lindsay Ex. 6). Rice also subsequently provided a statement in affidavit form for use at the hearing (Lindsay Ex. 9). According to Mullaney, he did not review the letter when he prepared Achernar's engineering exhibit (Tr. 671, 675, 681). It was

his subsequent review of the Rice affidavit on the evening of April 13, which prompted Mullaney to review his own calculations and discover his error (Tr. 669, 708-709). Mullaney regarded the computational error of insufficient importance to advise the Court on the morning of the 14th since his exhibit did not contain specific interference percentages and since all the applicants would provide interference far exceeding the requested level required by the Quiet Zone (Tr. 709-710).

64. On the morning of April 14, three minutes before the hearing began, Mullaney told Ms. Polivy, Achernar's general partner, of an error in calculation concerning page 5 of the exhibit, but said it had no material effect on Achernar's position (Tr. 886). Prior to that time, Ms. Polivy assumed that Mullaney's calculations were correct and that the statement in the exhibit was true (Tr. 912). There was no discussion of how the error was made, just that it was a computation error. *Id.* Nor was there discussion of how Mullaney came to find the error (Tr. 917-918). Mullaney told Ms. Polivy he had the right number on the work sheet summary page to be put in evidence, which she first saw at that moment, and that since the numbers were not in evidence aside from the worksheets about to be introduced, he saw no difficulty (Tr. 886, 913).

65. Ms. Polivy did not know that he had rechecked his calculations because of an affidavit he had requested from Rice after his first day of testimony or a conversation with Rice, but simply that he had rechecked. Mullaney just explained that he had got his work papers together and that there was an area in the calculations where he had recalculated and that the correct number was on the summary sheet, but that it had no material effect on the point and the mistake was in the work papers, not the exhibit, so the figures were never in the record (Tr. 917-921). While he said the error concerned Lindsay's signal strength received at Green Bank, he did not tie the error to any language in the exhibit and Ms. Polivy did not think of it in terms of making any language in the exhibit wrong; rather, she thought of it in terms that she would be introducing the correct numbers (Tr. 921-922). She took Mullaney's word for it in good faith that the matter had no significance and submitted the worksheets, which are in the record (Tr. 887, 913).

66. With respect to the second discrepancy -- Mullaney's claim that Achernar's "potential interference" was 40% below that of the other two proposals -- he asserted he became aware of the erroneous use of "potential interference" when confronted on cross-examination as to the meaning of the statement (Tr. 615, 625). Mullaney concedes he should not have used the words "potential interference" since he was talking about "effective radiated power." Mullaney is aware of the difference between the two terms and recognizes that both ERP and terrain considerations must be taken into account in determining potential interference. He agrees his choice of words was a mistake for which he has no explanation (Tr. 616-621, 656, 702).

67. Mullaney had no discussions with Ms. Polivy concerning the use of the 40% figure although he had told her he had done calculations which showed the other two applicants were worse. Ms Polivy assumed the figure was correct (Tr. 733, 908). Ms. Polivy learned of the second error when Mullaney was asked on cross-examination to explain the meaning of the statement (Tr. 887-804).

CONCLUSIONS

Qualification Issues

Air Hazard Issue

68. Achernar's proposed tower construction has received an FAA determination of no hazard to air navigation. Accordingly, Achernar has met its burden under this issue. Evangel has not tendered any showing that the FAA has approved Evangel's proposed tower construction. Thus, Evangel has failed to meet its burden under this issue, and as a result, it is found technically unqualified to be a Commission licensee. *Neil I. Sanders*, 102 FCC 2d 865 (Rev. Bd. 1985).

Quiet Zone Issue re Achernar

69. The National Radio Quiet Zone (Quiet Zone) is a fixed, 13,000 square mile area of Virginia and West Virginia which surrounds the National Radio Astronomy Observatory (NRAO) at Green Bank, West Virginia. The Quiet Zone was established by Commission Rule Making in 1958 in light of the Commission's determination that "it would be in the public interest to provide maximum practicable protection from interference to radio astronomy measurements at Green Bank and Sugar Grove without unduly disrupting existing radio services" *In the Matter of Radio Astronomy Facilities*, 17 RR 1738, 1739 (1958). The Commission recognized the need for broadcast services within the restricted zone. "However, the possibility of interference to radio astronomy observations must be considered in order to provide maximum protection necessary to operation at NRAO and NRRO." 17 RR at 1741.

70. It is concluded that there is a reasonable possibility that operation by Achernar as proposed will result in objectionable interference to the conduct of radio astronomy activities by the NRAO in the West Virginia "Quiet Zone." The record evidence clearly shows that with its proposed transmitter site and with its proposed ERP of 3182 kilowatts, Achernar will produce radiated power well in excess of NRAO's limits, indeed by a multiplication factor of 31,820. The record contains ample evidence that the power density limits imposed by NRAO are based upon levels established by the scientific and engineering profession worldwide and published as CCIR Report 224-4. The limits placed upon the frequencies used to operate Channel 64 in this proceeding are far less restrictive than those assigned exclusively for radio astronomy use. There is no record evidence that the NRAO's power density limits are anything but reasonable. There is no precedent for rejection of NRAO's limits as unreasonable, despite the opportunities to do so created by NRAO's comments and objections with regard to numerous applications before the FCC.

71. The record contains ample evidence of the activities which are conducted at the NRAO's facilities in Green Bank. Not only do NRAO's operations benefit the scientific and academic communities worldwide, but the evidence is just as clear that benefits extend to the general public through applications of advances achieved by radio astronomers to commercial and military arenas, the communications industry especially, and to medical diagnostic techniques. The nature of radio astronomy necessarily requires restrictions to be placed on noises and their sources. Indeed, the Commission itself recognized that "it is accepted generally that radio interference levels that are

tolerable for ordinary radio communications may be intolerable for radio astronomy observations" when it adopted the Quiet Zone rules. *In the Matter of Radio Astronomy Frequencies*, 17 RR 1738, 1739 (1958).

72. Achernar has provided no evidence that NRAO's noise limitations should be ignored or rejected and no evidence to offset against the important activities and contributions of NRAO. It is noteworthy that this is a case of first impression simply because unlike all previous applicants, Achernar has not been willing to accommodate NRAO's significant activities. Moreover, providing NRAO "maximum practicable protection from interference to radio astronomy measurements" would not unduly disrupt the utilization of Channel 64. Thus, Achernar, like the other two parties in this proceeding, could have located its transmitter site outside of the Quiet Zone and thereby eliminate the Quiet Zone issue, but it chose not to. Or, Achernar could have proposed to modify its operations in the Quiet Zone in an effort to address NRAO's reasonable concerns about potential interference, but it declined.

73. The only public interest ground offered by Achernar in support of its operating in the Quiet Zone is its proposal to serve some non-common "gray" area. However, Achernar's ability to claim such coverage stems from the fact that since the establishment of the Quiet Zone in 1958, other applicants for authority to construct television stations in Charlottesville have located their transmitters outside the Eastern boundary of the Quiet Zone (Tr. 116-117). In the single instance where a television station licensed to a nearby community has located its transmitter inside the Quiet Zone -- Station WVPT, Channel 51, Staunton, Virginia -- that station has cooperated with the NRAO to operate with a special antenna that was specifically designed for the purpose of suppressing radiation in the direction of the Green Bank facility (Tr. 118-119). If Achernar were to operate from its proposed transmitter site with such an antenna designed to protect Green Bank from interference, Achernar would serve no non-common gray area at all. For thirty years, the potential gain accruing through the advancement of science has outweighed second service considerations. Achernar provides no justification for altering that proposition.

74. Moreover, there is Commission precedent which establishes that protection of NRAO's operations outweighs service considerations. In determining whether to allot a new Class B FM channel to Amherst, Virginia, located in the Quiet Zone, the Commission ordered the proponent to provide it with detailed engineering showings specifying a transmitter site which would not conflict with the NRAO's facilities. While noting the apparent advantage for provision of first and second service from a site *within* the Quiet Zone, the Commission approved a departure from its normal practice of assigning Class B channels to larger communities, based on a transmitter site located *outside* the zone from which provision of first and second service was significantly less than from the Quiet Zone site. First Report and Order in Docket No. 20954, *Amendment of Section 73. 202 (b), Table of Assignments, FM Broadcast Stations (Amherst and Crozet, Virginia)*, 43 RR 2d 1489 (1978). Amherst makes clear, therefore, that whatever service benefits are provided by Achernar are outweighed by the benefits resulting from protecting the NRAO's activities.[9]

75. It is significant that in each and every case, the Commission has continued to enforce the Quiet Zone rule and to require protection of NRAO's operations. In each and every case, the NRAO's power density limits have been applied without Commission rejection or modification. There is no case in which the NRAO's limits have been rejected by the Commission, for countervailing public interest considerations or for any other reason.

76. In 1966, the Commission assigned UHF TV Channel 51 to Staunton, Virginia, located within the Quiet Zone. Report and Order in Docket No. 16882, *Amendment of the Table of Assignments in Section 73. 606 (b) of the Commission Rules and Regulations to Assign a UHF Television Broadcast Channel to Staunton, Virginia and Reserve it for Educational Use*, 5 FCC 2d 537, 8 RR 1623. The Commission made the allocation, despite the somewhat-less-than- maximum service that would be rendered by the station there:

> Negotiations with representatives of the observatories conducted prior to the issuance of the notice of proposed Rule Making brought about mutually acceptable criteria concerning the locations and use of Channel 51. The petitioners commented that while the proposal does not provide the maximum educational television broadcast service in the Shenandoah Valley area which would be possible were it not the proximity of the Sugar Grove and Green Bank facilities, the Commission should nonetheless make the assignment as proposed. NAEB in its supporting comments also called attention to the need for additional facilities in the radio quiet zone and expressed gratification that some accommodation had been reached which permits educational broadcasting without jeopardizing the significant public interests at stake in the work of the radio astronomy observatories.

Id., 8 RR 2d at 1623-1624. Nowhere did the Commission reject the limits imposed by NRAO, despite the obvious opportunity to do so.

77. In 1967, the Commission deleted seven FM channel assignments located in the Quiet Zone, including one in Waynesboro, Virginia, for which there were pending applications. Report and Order in Docket No. 16991, *Amendment of Section 73. 202, Table of Assignments, FM Broadcast Stations (Harrisonburg, Staunton, and Waynesboro, Virginia, Buckhannon, Elkins, Richwood, and Weston, West Virginia.* 6 FCC 2d 793, 9 RR 2d 1501. The Commission there instituted the requirement that subsequent requests to assign FM channels within the Quiet Zone would have to be "judged as to the impact they would have on the work being done" in Green Bank and Sugar Grove[10] which the Commission described as "of such significant public interest." *Id.* at 793, 794, 9 RR 2d at 1502. Of even greater significance, however, was the Commission's decision to delete the Waynesboro assignment despite the fact that there were two pending applications therefor which had been designated for hearing. The Commission had given these applicants 120 days to come to an agreement with NRAO and NRRS on proposed facilities which would be acceptable to the latter. No such agreement was reached and the channel was therefore deleted. Significantly, the Commission did not reject the power density limits imposed by NRAO there; it rejected the applications which failed to meet those limits.[11] The Commission actions emphatically demonstrate that the Commission has approved the power density limits used by the NRAO.

78. Moreover, the frequencies of 770 to 776 MHz are no less important in the study of radio astronomy than others used more often. The nature of the science of radio astronomy, as with the general quest for knowledge, is not given to predictable events. An seldom used frequency today can become vital to the study of a newly discovered object tomorrow. The contributions made by radio astronomers in such varied fields as telecommunications, medicine, space technology, computers, military science, as well as to the science of radio astronomy, constitute strong evidence of the just the kind of public interest considerations the Commission indicated it would consider in cases such as this one.

79. In sum, the record contains no evidence of any public interest contribution to be made by Achernar, save some service to underserved areas. But as the Commission has already pointed out, that is but one factor, and in the one case it considered such evidence, the need for protection of the Quiet Zone prevailed over the significant service benefits provided by a broadcast station from a transmitter site located within the Quiet Zone. *Amherst and Crozet, Virginia*, paragraph 11 *supra*. There is no room for any other conclusion than that Achernar has failed to meet its burden under the Quiet Zone Issue. The evidence is overwhelming that a grant of Achernar's application will result in objectionable interference to the NRAO's operations in Green Bank, and that as a result, Achernar's application must be denied as unqualified.[12]

Misrepresentation / Lack of Candor - Achernar

80. The findings establish that certain statements in Achernar's written engineering exhibit which deals with interference to the NRAO facility were false. However, the record establishes that Achernar's claim that the other applicants would create the same or more interference was the result of a calculational error. Achernar's failure to voluntarily disclose the discrepancy and to correct its engineering exhibit can not be condoned. However, Achernar's submission to the parties of the underlying data which made the discrepancy easily discernible demonstrates the absence of an intent to deceive the Commission. Similarly, Achernar's claim that potential interference from the Achernar proposal was over 40% below the two other proposals appears to be an inadvertent error. As disclosed by Achernar's consulting engineer who was solely responsible for preparing the exhibit, "effective radiated power", rather than "potential interference" was the intended words. In the absence of findings of intentional deception, there is no basis for Achernar's disqualification on the added misrepresentation issue.

Comparative Issue

Diversification

81. Evangel receives a diversification demerit for the following broadcast interests of its principals: Charles K. Wright, General Manager of Station WEFC(TV), Roanoke, Virginia, and President and Director of Vine and Branch, Inc., licensee of the Station; Betty Wright, Secretary of Vine and Branch, Inc.; Elizabeth Dowdy, Treasurer, of Vine and Branch, Inc.; and, Robert Hutchinson, Director of Ministries and Community Relations at Station WFHL(TV), Decatur, Illinois. With three Evangel principals in control of the licensee and operations of another Virginia television station and another Evangel principal holding a managerial position at an Illinois television station, Evangel warrants a moderate-to-substantial diversification demerit. *Billy D. Pirtle*, 43 FCC 2d 670, 28 RR 2d 188 (Rev. Bd. 1973) (substantial demerit for ownership of 90% of station within 80 miles of community of license); *Hispanic Owners, Inc.*, 57 RR 2d at 701 (moderate demerit assessed for ownership in several stations).

82. Neither Achernar nor Lindsay receives a diversification demerit. Lindsay receives no demerit for George Walton Lindsay's other media interests. Lindsay Publishing, a division of Keister-Williams Newspaper Services, Inc. (K-W), of which Lindsay is the 100% shareholder, publishes two weekly out-of- state newspapers: *The Yadkin Enterprise*, a free newspaper (circulation of 12,000 to 16,000 in Yadkin County, North Carolina and the adjacent community of Elkin) with a home office in Booneville, North Carolina, approximately 240 miles from Charlottesville; and, the *King Times - News*, a subscription newspaper (paid circulation of 4500 in Stokes and Forsythe Counties, North Carolina) with a home office in King, North Carolina, approximately 212 miles from Charlottesville. Neither newspaper is circulated in Charlottesville or Lindsay's proposed service area. Also, each newspaper has competition from other weekly newspapers, as well as from daily newspapers of general circulation. Finally, Lindsay does not manage the day-to-day business of these newspapers. In light of these facts, Mr. Lindsay's newspaper interests do not have any adverse impact on the Commission's diversification policies and do not warrant a demerit. *Barton Broadcasting Co.*, 104 FCC 2d 785, 60 RR 2d 322, 324 (Rev. Bd. 1986) (ownership of small weekly newspaper circulated in community of license does not warrant demerit).

83. Lindsay's ownership interest in K-W also has no impact on Lindsay's standing under the diversification criterion. Indeed, K-W is not a media interest cognizable under the diversification criterion. This is evidenced by the nature of K-W's product (an illustrated feature prepared well in advance of the date of publication which has a non-denominational, inspirational message and which has no content devoted to news or current events in any community); the nature of K-W's services (assisting approximately one-half of the newspapers which purchase the feature in selling business sponsors for the feature); the fact that neither Lindsay nor K-W has editorial control over the newspapers' use of the feature; and the fact that neither Lindsay nor K-W has ultimate control over the space which the newspapers will devote to the feature. Thus, Lindsay's interest in K-W warrants no diversification demerit to Lindsay.

Integration

84. In the case of Evangel, the maximum amount of quantitative integration credit that it could possibly receive for the proposed integration of Charles A. Wright and Charles K. Wright into the management of the station is 33% full-time and 33% part-time. Under this scenario, Evangel would also receive slight enhancement credit for the broadcast experience of the Messrs. Wright and very slight credit for Charles A. Wright's proposal of future residence in Charlottesville.

85. However, Evangel is not entitled to any integration credit. Evangel failed to formalize its corporate existence under Virginia law by the time that integration statements were filed in this proceeding. Indeed, at the time of the hearing, Evangel had no executed articles of incorporation, no by-laws and no minutes of meetings of the in-

dividuals who purportedly made up its board of directors. In short, there is no documentary evidence to support Evangel's bare assertions that Charles A. Wright and Charles K. Wright have been active principals of Evangel and involved in the management of its affairs. Similar to the applicant in *Hispanic Owners, Inc.*, 99 FCC 2d 1180, 57 RR 2d 695 (Rev. Bd. 1985), which failed to timely create a voting/non- voting corporate structure, Evangel "has failed the fundamental test required of all applicants, namely to show why it is entitled to the integration credit it claims." *Id.*, 57 RR 2d at 701. *See also Payne Communications, Inc.*, 1 FCC Rcd 1052, 61 RR 2d 1323, 1332-1334 (Rev. Bd. 1986) (as a matter of law, integration credit can not be awarded upon oral ownership arrangements in situations other than sole proprietorships). Accordingly, the integration proposals of the Messrs. Wright can not be credited and Evangel receives no quantitative integration.

86. Achernar receives credit for 100% quantitative integration of Margot Polivy. The findings establish that Ms. Polivy, the proposed general manager, has been in full and complete control of Achernar from the outset. Ms. Marcosson, the non-voting stockholder has not participated in any formal activities of the corporation. Her informal activities on behalf of the corporation was limited to a pre-filing introduction to an official of the bank which provided Achernar with its loan commitment. Significantly, Ms. Marcosson is not required to guarantee the loan. In every sense of the word, Ms. Marcosson is a "passive" investor. Achernar's opponents urge that Ms. Marcosson's equity interest should be counted because Achernar's by-laws do not expressly preclude Ms. Marcosson from serving as an officer and director and appear to permit Ms. Marcosson to vote for director. However, the denomination of stock issued to Ms. Marcosson as non-voting, as provided in the Articles of Incorporation, precludes the means to influence or control the activities of the corporation. To the extent that the by-laws indicate otherwise, the Articles's provisions would control. Moreover, the actions of Ms. Polivy and Ms. Marcosson in filing and prosecuting Achernar's application provide further assurance that Ms. Marcosson has not and does not intend to play an active role in the corporation's affairs.

87. Lindsay also contends that since Ms. Marcosson's 500 shares of non-voting stock constituted 50% of the equity when only 500 shares of voting stock were authorized and issued prior to the corrective amendment of the Articles, Ms. Polivy is only entitled to 50% integration credit. Initially, since it is clear that Achernar intended from the outset that Ms. Polivy would have a 90% equity interest and Ms. Marcosson a 10% equity interest, the corrective amendment will be credited. Even if Ms. Marcosson's equity share had remained at 50%, however, it would have no effect on the Achernar integration claim. Ms. Polivy is the only voting stockholder; there is no evidence of active involvement by Ms. Marcosson in corporate affairs; and whether Ms. Polivy holds a 50% or 90% equity share is irrelevant in determining her entitlement to integration credit.

88. Achernar's quantitative integration credit receives slight qualitative enhancement for Ms. Polivy's commitment to future full-time residence in Albemarle County, Virginia, which is in the service area of the proposed station. No enhancement credit is awarded for Ms. Polivy's weekends and vacations spent in Albemarle County since 1972. Ms. Polivy has maintained her legal residence in the District of Columbia and has voted in the District of Columbia. Furthermore, unlike *J. T. Lambrecht*, 99 FCC 2d 1219 (Rev. Bd. 1984), cited by Achernar, where part-time residence credit was awarded to an applicant who maintained a residence in the service area, the record reflects that she has not had any involvement in community or civic activities in the Charlottesville area to date. Thus, since Ms. Polivy's contacts with the proposed service area have merely been short-term visits to her farm, no qualitative enhancement credit is warranted. With respect to other qualitative enhancement credit Achernar receives credit for female status. Enhancement credit for female participation is less than that accorded minority participation. *Radio Gaithesburg, Inc.*, 72 FCC 2d 820, 829 (Rev. Bd. 1979).

89. Lindsay receives 100% full-time, quantitative credit for its proposal to integrate its sole principal, George Walton Lindsay, into the management of the day-to-day operation of the proposed television station. Evangel contends that Lindsay's business practices indicate that his integration commitment lacks permanence. The record of this proceeding is devoid of any testimony which supports this conclusion. Indeed, when Lindsay was asked whether he intended to pursue other business investments if Lindsay is awarded the permit, he testified that he would curtail his efforts to seek out other investments (Tr. 468), and that he would not be interested in seeking out other investments "for *several* years *at least* " (Emphasis added) (Tr. 526). Even if Lindsay were to pursue other investments in the distant future, there is nothing in the record to support a conclusion that he would relinquish his managerial position at the station in that event. Evangel's contention is devoid of any basis in fact and rests solely on speculation and surmise and is rejected.

90. Similarly lacking support in the record is Achernar's proposed conclusion that Lindsay's integration credit be eliminated or substantially reduced because of Lindsay's alleged over-commitment of time to other business interests. Achernar Conc. 11-16. Achernar asserts that Lindsay has committed himself to "an 80 hour work week" in the event Lindsay's application is granted. Achernar Conc. Paragraph 13. There is no record evidence from which Achernar could have drawn this conclusion and Achernar cites none. *Id.* Lindsay's testimony concerning his future work schedule in the event of the grant of Lindsay's application was clear and uncontroverted. He will phase down his time devoted to K-W (currently 10 -20 hours per week, Tr. 466) to "no more than 10 hours per week" which might be 10 hours out of a work week totaling 50 to 60 hours (Tr. 536, 555). He further testified that he would continue his current practice of spending probably two hours, and no more than 4 hours, per week on oversight of the North Carolina weekly newspapers (Tr. 465, 555-556) but, he could altogether eliminate his oversight of the newspapers, if necessary (Tr. 556). From the foregoing testimony, the only conclusion that can be drawn concerning Lindsay's work schedule relative to non-station matters is that the " *maximum amount of time he will devote to such matters is 14 hours per week. Added to his 40 hours at the station, Lindsay has committed himself to a work week of approximately 54 hours which is far less than Achernar's calculated total of 80 hours per week. More important, a 54-hour week is far less than the 70-hour per week which "teeters" on the outer limits of credibility. Northern Sun Corp.*, 57 RR 2d 1550, 1552 (Rev. Bd. 1985) *citing Bradley, Hand and Triplett*, 51 RR 2d 383

(Rev. Bd. 1982) (applicant's principal fully credited for 50-60 hour work week proposal). Thus, Lindsay has demonstrated the necessary assurance that its proposal will be carried out. It will be fully credited.

91. Lindsay's 100% quantitative integration credit is substantially enhanced by Lindsay's virtual life-long residence in the city of license, Charlottesville. In addition, Lindsay receives slight credit for his record of participation in and commitment to civic activities and community affairs in Charlottesville over the past twenty years. Achernar cites *Northern Sun Corp.*, 100 FCC 2d 889, 57 RR 2d 1550, 1553 (Rev. Bd. 1985) for support of its claim that Lindsay's past activities (the oldest of which, the Charlottesville Rotary Club, commenced in 1968, some 18 years prior to Lindsay's application, continued for ten years, and was reinstated after Lindsay's application was filed) should be disregarded. However, *Northern Sun Corp.* clearly holds that the Commission *will* credit civic activities that are less than 25 years in the past, albeit a discounted credit for activities that predate the filing of the application by more than seven years (57 RR 2d 1552). In addition, contrary to Achernar's conclusion, civic activities that post-date the filing of the application are given slight enhancement credit. *Bradley, Hand and Triplett*, 51 RR 2d 383, 388 (Rev. Bd. 1982). Clearly, each of Lindsay's civic activities deserves to be credited in this proceeding.

Comparative Coverage

92. None of the applicants propose to serve any "white" areas. With respect to "gray" areas, Achernar proposes to bring a second service to 15,244 people as compared to Evangel (871) and Lindsay (3,908). Achernar would also bring a third and fourth service to more people than would either Lindsay or Evangel. In addition, Achernar proposes to serve a larger total area and population.[13] If this was a typical comparative proceeding, Achernar would warrant a moderate to substantial preference for its coverage advantages. *See FBC, Inc.*, 55 RR 2d 1344 (Rev. Bd. 1983).[14] However, this proceeding is not typical. Indeed, but for Achernar's location of its transmitter inside the boundaries of the NRAO Quiet Zone -- an area which has been protected by Commission rules and policy for 30 years -- and its proposed operation at 3182 kW with an omnidirectional antenna, Achernar would not be able to cover the non-common gray area in the northwest portion of its Grade B contour.

93. It would be inequitable to award Achernar any preference for its proposed area and population coverage when its advantage was gained only because it chose to disregard the long-established policy of protecting the Quiet Zone in transmitter site selection where the other two applicants have not. Indeed, Achernar could have maintained its transmitter site in the Quiet Zone while proposing to reduce radiation in the direction of Green Bank, similar to that which has already been accomplished by another television station located in the Quiet Zone, WVPT, Channel 51, Staunton, Virginia. However, Achernar has refused to modify its original technical proposal because it would obviously lose the comparative coverage advantage that it has over Lindsay and Evangel. Such gamesmanship deserves no preferences in a comparative proceeding, and Achernar is not awarded one here.

Conclusions

94. Evangel and Achernar have been disqualified; the former for having failed to obtain FAA approval for its proposed antenna site, the latter under the "Quiet Zone" issue. Assuming this was not the case, Lindsay would still emerge as the comparative winner. Evangel ranks last because of its diversification and integration deficiencies. As between Lindsay and Achernar, Lindsay's enhancement credit for long term local residence and civic involvement outweighs Achernar's enhancement credit for female participation and Ms Polivy's commitment to future full-time residence in Albermarle County, Virginia. The public interest, therefore, would be better served by a grant of Lindsay's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Lindsay Television, Inc. for a construction permit for a new television station in Charlottesville, Virginia IS GRANTED; and the application of Evangel Communications, Inc. and Achernar Broadcasting Company ARE DENIED.[15]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The mutually exclusive applications of Commonwealth Broadcasting Corporation and Christopher Gault were voluntarily dismissed with prejudice. *See Order*, FCC 86M-3611, released December 12, 1986; *Order*, FCC 87M-162, released January 23, 1987.

[2] Issues designated against the applications of Christopher Gault and Commonwealth Broadcasting Company were mooted by the applicants' dismissal.

[3] The National Radio Astronomy Observatory (NRAO), having filed an objection to Achernar's proposed transmitter site, was made a party respondent with respect to this issue.

[4] The short-spacing issue designated against Evangel and Lindsay was resolved by summary decision in favor of both Lindsay and Evangel. *See Order*, FCC 87M-816, released April 14, 1987; *Order*, FCC 87M-765, released April 8, 1987.

[5] Official notice is taken of the distance between Roanoke, Virginia, community of license of Station WEFC(TV), and Charlottesville, Virginia: According to the Rand McNally Road Atlas, the distance between these two Virginia communities is 115 miles.

[6] Evangel's direct testimony concerning other media interests (Evangel Ex. 3) did not contain information concerning other media interests of Robert W. Hutchinson. However, it should be noted that Evangel filed a statement in this proceeding on December 22, 1986, reporting that Hutchinson was then currently employed as Director of Ministries and Community Relations with Station WFHL(TV), Decatur, Illinois.

[7] The Evangel signal also at 5,000 kilowatts, achieves a greater DB at the NRAO location than Achernar and Lindsay (Achernar Ex. 6).

[8] Tech Note 101 is a set of mathematical formulas describing the effects of propagation of radio waves over irregular terrain (Tr. 637).

[9] It should be noted that Channel 37 was withdrawn from TV broadcast service for 10 years so as to be available for use by the radio astronomy service. It is noteworthy that in taking that action, the Commission reasoned that the potential loss of a second service to some communities was outweighed by the potential gain to the advancement of science. *Report and Order : Re : Radio Astronomy*, 1 RR 2d 1501, 1515 (1963).

[10] This procedure was followed when the Commission assigned a second Class B FM channel to Harrisonburg, Virginia, where the petitioner reported that "extensive studies were conducted in coordination with both NRAO and NRRS to determine a specific channel, antenna site and antenna design which would meet the protection requirements of the agencies and at the same time provide service to Harrisonburg and environs." Report and Order in Docket No. 18259, *Amendment of Section 73. 202, Table of Assignments, FM Broadcast Stations. (Harrisonburg, Virginia)*, 14 FCC 2d 814, 815, 14 RR 2d 1578, 1579 (1968). No Commission disapproval of NRAO's "protection requirements" occurred in this case either.

[11] Said the Commission: "As a matter of information, it is pointed out that an application was recently granted for the use of TV channel 51 at Staunton, Va., in the quiet zone, based upon a carefully engineered proposal intended to provide adequate protection to the NRAO and the NRRS. Initially, the proposal did not meet the interference criteria of the NRAO or the NRRS. However, at the request of the applicant, the Commission initiated and participated in negotiations with the office of the Director of Telecommunications Management (Executive Office of the President), the Department of the Navy and the NRAO with a view toward resolving the problem. This led to joint engineering studies which resulted in changes in the proposal so as to make it mutually agreeable to all parties involved." *Id.* at 794, 9 RR 2d at 1502-1503.

[12] The Presiding Judge ruled at the hearing that the "Quiet Zone" issue was properly confined to the proposed operation of Achernar without regard to the proposed operations of Evangel and Lindsay (Tr. 136). The Judge ruled that to consider the potential interference by the two applicants which located their transmitters outside the boundaries of the Quiet Zone would necessarily render Section 73.1030(a) of the Commission's rules a nullity and turn the hearing into a "useless exercise" (Tr. 135). The Judge did, however, permit the taking of testimony concerning the effect of the operations of the other two, but it was only to be used as an offer of proof, and as such was not received as evidence (Tr. 142-143). Achernar's request for reconsideration of the ruling is rejected. Suffice it to say, neither Achernar nor the Bureau have provided a basis for the Judge to rewrite or eliminate a long standing Commission rule. Nor have they given the authority to do so.

[13] As between Evangel and Lindsay, Evangel merits a slight preference for its greater overall coverage of 420,604 as compared to Lindsay's 369,246, a difference of 51,358 or 13.9 percent. *Cotton Broadcasting Company*, 60 RR 2d 982, 985 (Rev. Bd. 1986). Lindsay is entitled to a moderate preference for providing greater service to 3,908 persons as compared to 871 persons, to a "grey" area. *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 582- 583 (Rev. Bd. 1984). Evangel is also entitled to a slight preference for greater overall service to remaining underserved areas. *Christian Broadcasting of the Midlands*, Inc. *supra*. Since the Commission gives greater priority to service to "grey" areas than it does to overall coverage or service to underserved areas, Lindsay's "grey" area advantage warrants a slight comparative coverage preference over Lindsay.

[14] A substantial preference would not be warranted since, unlike FBC, *supra*, Achernar would not serve a "white" area.

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of

VIKING AMUSEMENTS CORPORATION — File No. 599309-YX

Application to use certain of the 150 original 800 MHz conventional frequencies in a trunked mode of operation

ORDER

Adopted: August 10, 1988; Issued: August 18, 1988

By the Chief, Private Radio Bureau:

1. The Chief of the Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules[1] filed by Viking Amusements Corporation (Viking). Frequencies available under Section 90.615 may only be used for conventional operations. Trunked operation is not permitted. Viking desires to combine frequencies licensed as eight conventional SMR stations[2] to form a separate eight channel trunked system. Viking argues that allowing it to combine these frequencies and operate in the trunked mode will increase spectrum efficiency. Viking further contends that such action will not adversely affect any other licensees since it already has *exclusive* use of all eight frequency pairs.

2. We agree with Viking that allowing trunking on these frequencies would increase spectrum efficiency. That is one of the reasons we initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on these frequencies.[3] There are other criteria besides spectrum efficiency, however, that are relevant to the disposition of Viking's request for waiver. We must determine whether grant of the waiver would undermine the fundamental purpose that the rule was intended to accomplish.[4]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire the use of 800 MHz spectrum but do not have a requirement for a trunked system. It is, however, possible to obtain exclusive use of such frequencies through meeting a minimum loading requirement. Thus, once exclusivity has been established, the licensee effectively controls use of the frequency. The frequency pairs requested are licensed to Viking on an exclusive basis, thus Viking controls the frequency use. Viking's request therefore is essentially to change the technology used on the frequencies to improve spectrum efficiency. Because no other entity could have access to these frequencies, the particular use Viking makes of the frequencies will have no adverse affect on any other party. To the contrary, additional trunking may permit an increase in spectrum efficiency and promote significant public benefits. We conclude, therefore, that grant of the requested waiver is warranted.

4. Accordingly, Viking's request for waiver of Section 90.615 of the Rules to permit the use of these eight frequency pairs in the trunked mode is granted, pursuant to Section 0.331 of the Rules,[5] subject to it filing the appropriate frequency coordination documents,[6] and subject also to the outcome of any further proceedings in PR Docket 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[7] will remain applicable despite the fact that these frequencies will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 47 C.F.R. § 90.615.

[2] The eight SMR stations are licensed to Viking, all located at the same site and operate on frequencies available under Section 90.615.

[3] Notice of Inquiry, PR Docket 87-213, 2 FCC Rcd 3820 (1987), 52 Fed. Reg. 25265 (July 6, 1987). The Commission is currently in the process of reviewing the comments and reply comments filed in this proceeding.

[4] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[5] *See* 47 C.F.R. § 0.331.

[6] Changing from a conventional SMR to a trunked SMR is a change in the class of station and therefore requires frequency coordination. *See* 47 C.F.R. § 90.175.

[7] See 47 C.F.R. § 90.621.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988— 201-708/80026